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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 20

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

PHILIP J. ARONSON, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 3, 1937

CERTIORARI GRANTED MAY 3, 1937

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 20

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1935.

No. 3171.

PHILIP J. ARONSON, TRUSTEE,
PLAINTIFF, APPELLANT,
v.
THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE,
DEFENDANT, APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 6463 LAW DOCKET.

PHILIP J. ARONSON, TRUSTEE IN BANKRUPTCY OF THE VIKING MANUFACTURING COMPANY, INC., PLAINTIFF,
v.
THOMAS W. WHITE, INDIVIDUALLY, AND AS FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT.

WRIT.

[L. S.] MASSACHUSETTS DISTRICT, SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of our District of Massachusetts or his Deputy, GREETING:

We command you to attach the goods or estate of Thomas W. White, of Newton, Middlesex County, individually and as he was formerly Collector of Internal Revenue for the United States, Collection District of Massachusetts, defendant, in our District of Massachusetts, to the value of fifty thousand (50,000) dollars, and to summon said defendant (if he may be found in your district), to appear before our Judge of our District Court, next to be holden at Boston,

within and for our said District of Massachusetts, on the second Tuesday of September, 1935, then and there, in our said court, to answer unto Philip J. Aronson, of Brookline, Norfolk County, Massachusetts, as he is Trustee in Bankruptcy of The Viking Manufacturing Company, Inc., a Massachusetts corporation formerly of Boston, Suffolk County, Massachusetts, plaintiff, in an action of contract.

To the damage of the said plaintiff (as he says) the sum of fifty thousand (50,000) dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness the Honorable ELISHA H. BREWSTER, at Boston, the seventh day of June in the year of our Lord one thousand nine hundred and thirty-five.

JAMES S. ALLEN, *Clerk,*
by HELEN I. TWEEDY, *Deputy Clerk.*

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss. BOSTON, June 20, 1935.

Pursuant hereunto I have this day attached a chip, the property of the within named Thomas W. White, and later on the same day I summoned the within named Thomas W. White to appear at court and answer as herein directed by giving to him in hand at Newton in the said District an original summons to this writ.

JOHN J. MURPHY, *United States Marshal,*
by DANIEL J. CHAPMAN, *Deputy.*

The writ in this cause is dated the seventh day of June, A. D. 1935, and was duly entered at the September Term of this court, A. D. 1935, when and where the parties appeared by their respective attorneys.

At the entry of this cause, to wit, September 10, 1935, the following Declaration was filed:

DECLARATION.

[Filed September 10, 1935.]

COUNT I. 1. The plaintiff is, and was at all times material herein, a resident of Brookline, County of Norfolk in the Commonwealth of Massachusetts, and a citizen of the United States.

2. The Viking Manufacturing Company, Inc. is a corporation duly organized under the laws of Massachusetts, formerly having its usual place of business in Boston, County of Suffolk, in said Commonwealth. Said corporation was engaged in the business of manufacturing jig saw puzzles. On or about September 29, 1934, it was duly adjudicated a bankrupt upon a voluntary petition filed in this court. Plaintiff was thereafter appointed trustee in bankruptcy of said corporation on October 23, 1934.

3. The defendant, Thomas W. White, is a resident of Newton, in the County of Middlesex in said Commonwealth, and was from December 1, 1925 to August 31, 1933, the duly appointed Collector of Internal Revenue of the United States of America for the District of Massachusetts.

4. This is a suit, arising under the laws of the United States providing for internal revenue, to recover the sum of thirty-seven thousand twenty-one and 63/100 dollars ($37,021.63), which was wrongfully and erroneously assessed against The Viking Manufacturing Company, Inc. and illegally and unlawfully collected from it as a manufacturer's excise tax by the defendant while acting as such Collector of Internal Revenue, the defendant claiming the right to assess, demand and collect said tax from The Viking Manufacturing Company, Inc., under the provisions of Section 609 of the Revenue Act of 1932.

5. Section 609 of the Revenue Act of 1932 provides as follows:

"SEC. 609. TAX ON SPORTING GOODS.

There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, base-

ball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods."

6. Pursuant to the provisions of said Section 609 of the Revenue Act of 1932 and the regulations issued thereunder, The Viking Manufacturing Company, Inc. duly filed with the defendant its returns of gross monthly sales of the jig saw puzzles manufactured by it covering the period from June 21, 1932 to May 1, 1933, and duly paid thereon to the defendant the total sum of $37,021.63 on the following dates and in the following amounts:

Date.	Amount.
January 30, 1933	$3,075.13
February 16, 1933	259.40
February 27, 1933	6,826.05
March 31, 1933	10,519.50
May 1, 1933	16,341.55
Total	$37,021.63

7. Plaintiff alleges—

FIRST. That the jig saw puzzles manufactured by The Viking Manufacturing Company, Inc. were not "sporting goods" or "games" within the meaning of Section 609 of the Revenue Act of 1932 and were therefore not subject to tax under that section.

SECOND. That the articles manufactured by it were children's toys or games expressly exempt from taxation under the provisions of said section.

THIRD. That the regulation or ruling of the Commissioner of Internal Revenue exempting from taxation under Section 609 of the Revenue Act of 1932 only such jig saw puzzles as contained fifty (50) pieces or less is arbitrary, unreasonable and discriminatory in its application to The Viking Manufacturing Company, Inc. and all

other manufacturers of jig saw puzzles containing in excess of 50 pieces and that said regulation or ruling constitutes an improper and discriminatory classification in violation of the Fifth Amendment to the Constitution of the United States.

FOURTH. That Article 11 of Regulations 46 relating to excise taxes on sales by the manufacturer under Sections 602 to 611, inclusive, 613 and 614 of the Revenue Act of 1932, in providing for a presumption that where no separate charge is made as a tax it will be presumed that the tax is included in the price charged for the article, adopts a presumption which is arbitrary, unreasonable and confiscatory, and violates the Fifth Amendment to the Constitution of the United States.

8. Plaintiff further alleges that at no time did The Viking Manufacturing Company, Inc. include the tax in the price of the article (jig saw puzzles) with respect to which it was allegedly imposed under said Section 609 nor did it collect the amount of said tax from the vendee; that said taxes were actually paid by The Viking Manufacturing Company, Inc. and were not paid by any other firm, person, individual, corporation or association.

9. On or about March 16, 1935, the plaintiff duly filed with the Collector of Internal Revenue then in office a claim for refund of the said sum of $37,021.63, setting forth as grounds therefor, among others, the reasons alleged in paragraphs 7 and 8 hereof, which claim for refund was disallowed and rejected by the Commissioner of Internal Revenue on May 27, 1935.

10. Plaintiff alleges that the said sum of $37,021.63 was erroneously, illegally and unlawfully collected from The Viking Manufacturing Company, Inc. by the defendant in violation of the Constitution of the United States and the statutes enacted thereunder.

11. The said sum of $37,021.63 has never been repaid to your plaintiff.

Wherefore the defendant owes the plaintiff the said sum of $37,021.63, together with interest at the rate of six (6) per centum per annum from the respective dates of payment as alleged.

COUNT. II. And the plaintiff says that the defendant owes him the sum of thirty-seven thousand twenty-one and 63/100 dollars ($37,-

021.63), together with interest from the respective dates of payment thereof as hereinbefore alleged, for money had and received by the defendant to the plaintiff's use.

Counts I and II are for the same cause of action.

PHILIP J. ARONSON,
Trustee in Bankruptcy of The Viking Manufacturing Company, Inc., by his Attorney,
SAMUEL GOTTLIEB.

At the same term, to wit, October 1, 1935, an answer was filed.

Also at the same term, to wit, November 25, 1935, the following Waiver of Jury Trial was filed:

WAIVER OF JURY TRIAL.
[Filed November 25, 1935.]

It is hereby agreed by the parties hereto that trial by jury is waived.

SAMUEL GOTTLIEB,
Attorney for the Plaintiff.

FRANCIS J. W. FORD,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney,
Attorneys for the Defendant.

On the said twenty-fifth day of November, A. D. 1935, the following Defendant's Motion to Amend and Amended Answer was filed and allowed by the court:

DEFENDANT'S MOTION TO AMEND AND AMENDED ANSWER.
[Filed and Allowed November 25, 1935.]

Now comes the defendant in the above-entitled action and moves to amend his answer filed herein to read as follows:

1. The defendant admits the allegations set forth in paragraphs 1, 2, 3, 5, 6, 9 and 11 of count I of the plaintiff's declaration.

2. The defendant denies the allegations set forth in paragraphs 7, 8 and 10 of count I of the plaintiff's declaration.

3. The defendant admits the allegations set forth in paragraph 4 of count I of the plaintiff's declaration except the allegations that the sum of $37,021.63 was wrongfully and erroneously assessed against the plaintiff and illegally and unlawfully collected, which allegations the defendant denies.

4. The defendant denies each and every allegation set forth in count II of the plaintiff's declaration.

By his Attorneys,

FRANCIS J. W. FORD, *United States Attorney,*
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

Plaintiff assents to allowance of this motion.

By his Attorney,
SAMUEL GOTTLIEB.

This cause was thence continued to the December Term, A. D. 1935, when, to wit, December 31, 1935, said cause was set down for trial without a jury, the Honorable George C. Sweeney, District Judge, sitting.

On the said thirty-first day of December, A. D. 1935, the following Defendant's Motion for Judgment was filed:

DEFENDANT'S MOTION FOR JUDGMENT.
[Filed December 31, 1935.]

Now comes the defendant in the above-entitled action and on the pleadings and the evidence herein moves that judgment be entered for the defendant and against the plaintiff with costs.

By his Attorneys,

FRANCIS J. W. FORD, *United States Attorney,*
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

At the same term, to wit, January 14, 1936, the following Plaintiff's Motions were filed by leave of court:

PLAINTIFF'S MOTION FOR A SPECIAL FINDING OF THE FACTS.

[Filed by Leave of Court January 14, 1936.]

Now comes the plaintiff in the above-entitled cause and respectfully moves this court to make a special finding of the facts.

PHILIP J. ARONSON,
as he is Trustee in Bankruptcy of The
Viking Manufacturing Company, Inc.,
by his Attorneys,
SAMUEL GOTTLIEB,
ISRAEL GOROVITZ.

PLAINTIFF'S MOTION FOR JUDGMENT.

[Filed by Leave of Court January 14, 1936.]

Now comes the plaintiff in the above-entitled cause and respectfully moves this court to enter judgment for the plaintiff in the amount claimed in the declaration, together with interest and costs.

PHILIP J. ARONSON,
as he is Trustee in Bankruptcy of The
Viking Manufacturing Company, Inc.,
by his Attorneys,
SAMUEL GOTTLIEB,
ISRAEL GOROVITZ.

On the said fourteenth day of January, A. D. 1936, the following Defendant's Request for a Ruling of Law, Plaintiff's Requests for Rulings of Law, and Plaintiff's Request for Findings of Fact were submitted to the court:

DEFENDANT'S REQUEST FOR A RULING OF LAW.

[Submitted to the Court January 14, 1936.]

Now comes the defendant in the above-entitled action and requests the court to find as a matter of law that under Section 609 of the Revenue Act of 1932 (47 Stat. p. 264; 26 U. S. C. A. p. 430, 1935 Ed.) the Commissioner of Internal Revenue properly imposed an excise tax at the rate of ten percent (10%) on the jig saw puzzles

sold by The Viking Manufacturing Company, Inc. during the years in question.

By his Attorneys,

FRANCIS J. W. FORD, *United States Attorney,*
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

PLAINTIFF'S REQUESTS FOR RULING OF LAW.
PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT.

[MEMORANDUM. Copies of plaintiff's requests for rulings of law and plaintiff's requests for findings of fact will be found printed on pages 42–49 of this Transcript of Record as part of plaintiff's bill of exceptions. JAMES S. ALLEN, *Clerk.*]

At the same term, to wit, February 19, 1936, said cause came on for further hearing and it was ordered by the court that the plaintiff's motion for judgment be denied, plaintiff's exceptions being saved.

On the said nineteenth day of February, A. D. 1936, an opinion of the court was announced.

Also on said nineteenth day of February, it was ordered by the court that the defendant's request for a ruling of law be granted; plaintiff's requests for rulings of law be allowed in so far as they are consistent with opinion and denied in so far as they are inconsistent; plaintiff's requests for findings of fact allowed insofar as they are consistent with opinion and denied insofar as they are inconsistent, and judgment to be entered for the defendant.

This cause was thence continued to the present March Term, A. D. 1936, when, to wit, June 5, 1936, the following Stipulation Relative to Printing Certain Exhibits is filed:

STIPULATION RESPECTING THE PRINTING OF CERTAIN EXHIBITS.

[Filed June 5, 1936.]

It is hereby stipulated and agreed by and between the parties to the above-entitled cause as follows:

1. That Plaintiff's Exhibit 2 need not be printed in the record of

this cause, but may be transmitted to the United States Circuit Court of Appeals for the First Circuit as an original exhibit.

2. That Plaintiff's Exhibits 4 and 6 need not be printed in the record of this cause.

PHILIP J. ARONSON,
Trustee in Bankruptcy of The
Viking Manufacturing Company, Inc.,
by his Attorneys,
SAMUEL GOTTLIEB,
ISRAEL GOROVITZ.

THOMAS W. WHITE,
Individually and as former Collector of Internal
Revenue for the District of Massachusetts,
by FRANCIS J. W. FORD, *United States Attorney,*
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

On the said fifth day of June, A. D. 1936, a plaintiff's bill of exceptions is filed within extended time and allowed by the court.

On the twenty-second day of June, A. D. 1936, it is considered by the court on the finding of the court, the Honorable George C. Sweeney, District Judge, sitting, that the said Philip J. Aronson, Trustee in Bankruptcy of The Viking Manufacturing Company, Inc., plaintiff, take nothing by his said writ and that the said Thomas W. White, individually and as former Collector of Internal Revenue, defendant, recover of the said plaintiff his costs of suit taxed at

---

OPINION.

February 19, 1936.

SWEENEY, J. This is an action at law brought by the plaintiff, as trustee in bankruptcy of The Viking Manufacturing Company, Inc., to recover taxes assessed against the company as a manufacturer's excise tax under the provisions of Section 609 of the Revenue Act of 1932.

The facts are as follows: The Viking Manufacturing Company, between June 21, 1932 and May 1, 1933, paid the following taxes:

"Date,	Amount.
January 30, 1933	$3,075.13
February 16, 1933	259.40
February 27, 1933	6,826.05
March 31, 1933	10,519.50
May 1, 1933	16,341.55
Total	$37.021.63"

being at the rate of 10 percent on the manufacture and sale of articles described as puzzles of the jig saw type. The puzzles contained between 162 and 500 pieces each.

The court finds as a matter of fact that the Viking Company did not pass the tax along to its vendees. The sole question remaining is whether the article manufactured by the Viking Company, namely, a puzzle of the jig saw type, and commonly referred to as a jig saw puzzle, was taxable under Section 609 of the Revenue Act of 1932, which provides that:

> "There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basket ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods."

Treasury Regulations 46, promulgated under the Revenue Act of 1932, and pertaining to Section 609, contains the following:

> "Art. 53. Scope of Tax.—The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well

as to all similar articles commonly or commercially known as sporting goods, games, and parts of games (except playing cards and children's toys and games).

The term 'sporting goods' includes all articles of the same general character as those specifically named, the purpose of which is primarily for use either indoors or outdoors in connection with a game or sport.

The term 'game' includes games of skill or chance and every contrivance, device, or combination or articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax."

The plaintiff contends that a puzzle of the jig saw type is not within the meaning of the word "game" as used in the statute, and supplies a great many argumentative reasons in support of his contention. Among the many definitions given by Webster's Dictionary there is one which describes a game as an "amusement or diversion". This interpretation of the word "game" was maintained in the case of *Mills Novelty Co.* v. *United States,* 50 Fed. (2d) 476, where the court stated:

> "The word 'game' is very comprehensive, and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement."

In the enactment of this legislation Congress had in mind a comprehensive and all-inclusive scheme of taxation which was intended to cover the articles set forth therein generally, giving the words of that Act a fair meaning. As stated in *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658:

> "The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries: that is, articles not reasonably necessary to comfort according to the average standards of American life."

There is nowhere shown in the enactment an intent to except a

game or puzzle such as is here involved. Turning to the contemporary construction placed on this Act by the Commissioner of Internal Revenue, it will be seen that under Article 53 of Regulations 45, promulgated on June 18, 1932, a game was deemed to include "every contrivance . . . designed to furnish sport, recreation or amusement".

It is to be noted that the only exceptions set forth in the statute on the question of taxability are "playing cards and children's toys and games". The petitioner contends that it should be exempt as being a children's toy or game. The burden of proving that he is within the exceptions to the Act is on the plaintiff.

The Commissioner has ruled that, for the purpose of the Act, puzzles containing 50 pieces or less will be considered children's games, and not subject to the tax, X1-2 Cumulative Bulletin, 481: Regulations 46, Article 55: Games—Taxability of jig saw puzzle as a game:

> "Advice is requested concerning the taxability, under section 609 of the Revenue Act of 1932, of jig saw puzzles as games.
>
> The word 'games' as used in section 609 of the Revenue Act of 1932, does not mean the games themselves but the instrumentalities used in playing them. (See *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658, T. D. 3401, C. B. I-2, 297.) Under the strict interpretation of that word all picture puzzles could be classified as games and held to be taxable. However, children's games are specifically exempted from the tax. It would follow that if the picture puzzles, or games, are of the type ordinarily designed for the use of children, they are not taxable.
>
> A jig saw puzzle containing comparatively few pieces may properly be considered as one so simple as to warrant classification as a children's game and exempt from the tax. Where such puzzles contain many pieces they become more complex and are taxable on the ground that they are designed for use by adults. For revenue purposes, it is held that if the jig saw puzzle contains 50 pieces or less, it is a children's game and not subject to the tax. If the jig saw puzzle contains more than 50

pieces it is subject to the tax as a game under section 609 of the Revenue Act of 1932."

The plaintiff has not sustained the burden of proving that jig saw puzzle comes within the exceptions as being a children's game, nor do I find that the Commissioner's ruling that games with less than 50 pieces are children's games is an arbitrary or unfair ruling. Obviously some line of demarcation had to be maintained, and this seems to be as fair as any.

The plaintiff's motion for judgment is denied. The defendant's request for a ruling of law is granted. The plaintiff's requests for rulings of law are allowed insofar as they are consistent with this opinion, and are denied insofar as they are inconsistent. The plaintiff's requests for findings of fact are allowed insofar as they are consistent with this opinion, and are denied insofar as they are inconsistent. Judgment may be entered for the defendant.

PLAINTIFF'S BILL OF EXCEPTIONS.

[Filed and Allowed June 5, 1936.]

This is an action brought by the plaintiff, as trustee in bankruptcy of The Viking Manufacturing Company, Inc., to recover the sum of $37,021.63, with interest, which was paid by The Viking Manufacturing Company, Inc. to the defendant as a manufacturer's excise tax under the provisions of Section 609 of the Revenue Act of 1932 on account of the sale by said company of picture puzzles of the jig saw type, described in the plaintiff's declaration as jig saw puzzles, during the period from June 21, 1932 to May 1, 1933.

The defendant on October 1, 1935, filed a general denial. In an amended answer filed on November 25, 1935, certain of the allegations in the plaintiff's declaration were admitted. All of the pleadings appear elsewhere in the record and are expressly incorporated in and made a part of this bill of exceptions by reference.

On Novmber 25, 1935, trial by a jury was waived by stipulation in writing and on December 31, 1935, the case was tried before Sweeney, J., sitting without jury, upon the two issues of fact raised by the pleadings, namely, (1) whether or not the picture puzzles manufactured by The Viking Manufacturing Company, Inc. were tax-

able as "games and parts of games" or "sporting goods" under Section 609 of the Revenue Act of 1932, or, as contended by the defendant, whether the Commissioner of Internal Revenue, under Section 609 of the Revenue Act of 1932, erred in assessing an excise tax on picture puzzles of the jig saw type, described in the declaration as "jig saw puzzles", which were manufactured and sold by The Viking Manufacturing Company, Inc. during the period of time in controversy, and (2) whether or not the taxes paid by The Viking Manufacturing Company, Inc. to the defendant were borne by the company or passed on to the ultimate consumer.

GEORGE S. PARKER was called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gottlieb as follows:

He lives in Salem, Massachusetts, and Peterborough, New Hampshire. His legal address is really Peterborough, New Hampshire. He is chairman of the board of Parker Brothers, manufacturers of games, kindergarten goods, picture puzzles and novelties. That describes the business of Parker Brothers; there are some other minor things they make but those are the principal four. He has been in that business 53 years. He has invented a great many games, puzzles or toys and has had a very great many patents issued to him.

His firm manufactures jig saw puzzles at the present time. Their first jig saw puzzles were made perhaps in 1908 and 1909 and picture puzzles of the jig saw type have been made by them continuously thereafter. These jig saw puzzles manufactured by his company have been sold to the trade generally throughout the United States; to dealers, wholesale and retail.

He is familiar with the terminology of the trade or business in which he is engaged. In the terminology of the trade the word "game" never includes either puzzles or toys.

Thereupon the witness testified, subject to the defendant's objection and exception, duly saved, that in his opinion a jig saw puzzle is not a game and never was. The witness then further testified as follows:

As a manufacturer of games and puzzles he would define the

word "game" as a contest between players or sides, as usually expressed, for the purpose of determining the winner and for the purpose of amusement. He thinks that describes a game accurately. Games ordinarily have a set of rules and he can think of no game which is not intended to have a victor and a loser. As a manufacturer of games and puzzles he would say that the term "puzzle" defines itself; that is exactly what it is; that is why the word is used; it applies commercially to that article. Picture puzzles of the jig saw type do not usually have a set of rules. He was shown articles purporting to be some of those which used to be manufactured by The Viking Manufacturing Company. The witness referred to the articles exhibited to him as "paper puzzles". The puzzles shown the witness (later introduced into evidence as Plaintiff's Exhibit 2) are the type of the Viking make. He would describe those puzzles as picture puzzles of the jig saw type.

He does not know when the jig saw puzzle or the dissected picture puzzle was first invented. There have been picture puzzles probably going back to the first part of the last century, perhaps to the Revolution with certain types.

Whether children are as adept as adults in solving jig saw puzzles all depends upon the child; many children are rather smarter than their parents in doing them. Children very frequently are very adept at it. It depends largely upon following the colors and shapes and children are ordinarily very smart at that. From his experience he would say that children frequently solve puzzles in excess of 50 pieces.

Thereupon the following questions were asked and the following colloquy occurred:

"*Q.* 1. From your knowledge and experience in the trade, would you say that a ruling that all jig saw puzzles having 50 pieces or less are children's games, and all jig saw puzzles having more than 50 pieces are adult games,—would you say that ruling is a reasonable one as a matter of fact?

Mr. SMITH. I object to that.

The COURT. Objection sustained.

Mr. GOTTLIEB. One of our contentions here is, if your Honor please, that the Commissioner made an arbitrary ruling.

The COURT. So I understand.

Mr. GOTTLIEB. And we know of no way to meet it—

The COURT. You have raised it, have you not? You have raised that question.

Mr. GOTTLIEB. But to meet it with evidence.

The COURT. You say this is an unjust tax because the discretion used by the Commissioner was arbitrary.

Mr. GOTTLIEB. We want to try to assist the court with evidence.

The COURT. You have introduced evidence, have you not, as to the degree of adaptability of persons to solving picture puzzles?

Mr. GOTTLIEB. I have.

The COURT. How much further is it necessary to go?

Mr. GOTTLIEB. May I save an exception to that ruling, if your Honor please?

The COURT. Yes.

Q. 2. Are you familiar with the provisions of Section 609 of the Revenue Act of 1932 which imposes a tax on games and parts of games, except children's toys and games? *A.* Yes.

Q. 3. When information first came to your knowledge of this tax under the Revenue Act of 1932, were you of the opinion that the word 'games' comprehended and included jig saw puzzles?

Mr. SMITH. I object to that, your Honor.

The COURT. Objection sustained.

Q. 4. Did you as a manufacturer of jig saw puzzles make any monthly reports as required by law—

Mr. SMITH. I object to that, your Honor.

The COURT. Sustained. You mean Parker Bros.?

Mr. GOTTLIEB. Parker Bros., —as showing—

The COURT. What they did has nothing to do with this suit.

Mr. GOTTLIEB. The interpretation given by him to that section of the law—that they did not treat jig saw puzzles as games.

The COURT. I will not receive that and save your exception if you want it.

Mr. GOTTLIEB. All right.

Q. 5. Do you remember when Parker Bros. first made its return to the Collector of Internal Revenue on jig saw puzzles as games?

Mr. SMITH. I object to it.

The COURT. I sustain it. Whatever Parker Bros. did has no bearing in this case whatsoever. This is what the Viking people did.

Mr. GOTTLIEB. Except for the fact of the terminoligy and the feeling of the trade.

The COURT. I do not care how the trade felt about it. It is going to be how this court feels about it that determines it.

Q. 6. Would you say that the difficulty of a jig saw puzzle depends solely on the number of pieces, or are there other factors? *A.* There are other factors. Ease is sometimes a matter of the color distribution and how the puzzle is cut, following the lines of color and so forth. For instance, two blue pieces fitting together very definitely belong together, if it is part of the blue sky. If it is so cut that the blue sky, the patch of blue is all that there is, it may be more difficult to fit in.

Q. 7. Did Parker Bros. manufacture cross word puzzles in 1932 and 1933?

Mr. SMITH. I object to that.

The COURT. Objection sustained. There is no issue here in connection with cross word puzzles, is there?

Mr. GOTTLIEB. Except this: the Government is going to rely on their ruling and at about the same time there is an unreported ruling that cross word puzzles are not taxable as games. I think there is a similarity between cross word puzzles and jig saw puzzles, and I think that the Government is going to rely on a regulation or ruling of the Commissioner made at about the same time.

The COURT. If you pursue that line of thought you can carry it down to any puzzle, like the well-known twisted nails.

Mr. GOTTLIEB. Except there is a similarity between cross word puzzles and jig saw puzzles.

The COURT. I see no similarity. Regarding puzzles generally, a person does a lot of things which you do not do, like getting the black ball in the nigger's eyes and that sort of thing—twisting the nails. I think they have no similarity, unless I am confused about it.

Q. 8. Did your concern manufacture jig saw puzzles during the years 1919, 1920 and 1921? *A.* Yes, sir.

Mr. SMITH (to Reporter). May I hear that question? [Question read.] I object.

The COURT. What is the purpose of it?

Mr. GOTTLIEB. There was a similar provision of the law during those three years, and during those three years jig saw puzzles were not taxed as games. The Commissioner may come along and say there is an established course of conduct by the Commissioner of Internal Revenue which had to be taken into consideration in determining whether a certain article is taxable.

The COURT. When did the ruling that you complain of go into effect?

Mr. GOTTLIEB. In November, 1932, about six months after this particular Revenue Law was passed.

The COURT. What was the status of jig saw puzzles before that, before 1932?

Mr. GOTTLIEB. There was no tax on games between December 31, 1921 and June 6, 1932. Games were subject to tax for three years, 1919, 1920 and 1921; then the law was repealed, and practically the same provision was restored to the law on June 6, 1932.

The COURT. I think I will take notice of it without having you give me any assistance on it.

Mr. GOTTLIEB. In that connection we intend to offer evidence that the Commissioner, previous to his ruling of November 6, some time in August, 1932, made the ruling that jig saw puzzles were not taxable as games. It was not a published ruling, and I want to pursue that line.

The COURT. I will allow that.

Mr. GOTTLIEB. Have you that ruling I asked you to produce?

Mr. SMITH. For Parker Bros.?

Mr. GOTTLIEB. Yes, for Parker Bros.; and one for cross word puzzles.

Mr. SMITH. I have a ruling, if your Honor please, on jig saw puzzles but directed to the Collector of Internal Revenue in New

York and applicable to an entirely different taxpayer from The Viking Manufacturing Company.

The COURT. But it refers to jig saw puzzles generally?

Mr. SMITH. It refers to a letter in which there is a reference to a catalog from this concern that made the puzzles.

The COURT. Jig saw puzzles.

Mr. SMITH. Jig saw puzzles.

The COURT. I think it is admissible.

Mr. SMITH. That has since been revoked.

The COURT. You may show the revocation but I will allow the ruling.

Mr. SMITH. May I have an exception to that?

The COURT. You may."

Thereupon, a letter addressed to the Collector of Internal Revenue, Brooklyn, New York, and dated August 26, 1932, was introduced into evidence and marked "Plaintiff's Exhibit 1". Said letter was then read into the record and reads as follows:

PLAINTIFF'S EXHIBIT 1.

C. S. Hammond & Co., Inc.

MT:ST:MR Aug. 26 1932

Collector of Internal Revenue, Brooklyn, New York.

Attention: MT:FEC:KJ

Reference is made to your letter of August 12, 1932, in which there was enclosed a catalogue received by your office from C. S. Hammond & Co., Inc., of Brooklyn, New York, in which there were illustrated various puzzles manufactured by this company. You request information as to whether these puzzles are subject to the tax imposed by section 609 of the Revenue Act of 1932.

You are advised that the various puzzles illustrated in the catalogue received from the above company are not taxable as games under section 609 of the Revenue Act of 1932.

R. M. ESTES, Deputy Commissioner.

FS–MHD cc–Capt. Bliss cc–Mr. Dunsmore

[Written on margin:]
ruling reversed 2/7/33

The following colloquy then occurred:

"The COURT. Are you going to introduce anything to show whether that letter as produced referred to 50-piece puzzles or more?

Mr. GOTTLIEB. No, I have no evidence of that, other than the general ruling that jig saw puzzles—The 50-piece ruling was not made until November, 1932. I have this general ruling that jig saw puzzles were not taxable.

The COURT. I will take it for what it is worth."

Thereupon the following questions were asked and the following rulings made, to which the plaintiff's exceptions were duly saved:

"*Q.* 9. Did your company pay any taxes—

Mr. SMITH. I object to that, your Honor.

The COURT. Sustained.

Mr. GOTTLIEB. Save my exception. I had not finished the question.

Q. 10. Did your company pay any taxes on jig saw puzzles as games during the years 1919, 1920 and 1921? *A.* No.

Mr. SMITH. I object to that.

The COURT (to Witness). Just hold your answers, Mr. Witness, until the court has ruled on the objection. The objection is sustained. The answer may be stricken.

Mr. GOTTLIEB. May we have an exception to that?

The COURT. You may.

Q. 11. Do you know whether the trade generally paid any tax during 1919, 1920 and 1921 on jig saw puzzles?

Mr. SMITH. I object to that.

The COURT. Objection sustained.

Mr. GOTTLIEB. Exception to your Honor's ruling.

The COURT. You may have an exception to that ruling."

On *cross-examination* the witness testified as follows:

He says that it takes more than one to play a game. He has never seen a game with one person, outdoors or indoors.

Thereupon the following question was asked and the following colloquy occurred:

"X-*Q.* 12. How many play a ouija board? *A.* A ouija board isn't a game.

Mr. GOROVITZ. I object to that.

A. (continued). It is a device—

Mr. GOROVITZ. Just a minute.

A. (continued). I tell you what it is—

Mr. GOROVITZ. Mr. Parker, will you just hold your answer until the court has ruled on my objection?

The COURT. What is your objection?

Mr. GOROVITZ. If we cannot go into the question of cross word puzzles, I do not think that the Government has right to go into the question of ouija boards.

The COURT. There is no analogy there. This witness has testified that every game took two or more persons to play, and I will allow the question.

Mr. GOROVITZ. May we have an exception?

The COURT. You may.

Mr. SMITH (to Reporter). Will you read the question?

[The last question is read.]

The COURT. How many players does the ouija board have?

The WITNESS. I would not say. It is ordinarily, I think, used by one person. But it is not a game."

The witness further testified that he does not consider a penny-in-the-slot machine or a nickel-in-the-slot machine a game; it is a gambling device but not a game.

Thereupon the following questions were asked by the court and the following answers given:

"The COURT. Mr. Witness, how about these contraptions where you shoot a ball from a spring and try to shoot it into a hole? Do you call that a game?

The WITNESS. That is a device. Commercially, I would say not. I would say it was a game if there was a contest between players.

The COURT. Is it not a game of skill if one person plays it?

The WITNESS. Oh, no, I should not say it is a game.

The COURT. What is it?

The WITNESS. It is an exercise, amusement. It is an amusement, an exercise, quite different from a game. A game is a contest.

The COURT. That is all.

The WITNESS. I don't know of any game which is not a contest, indoors or outdoors.

The COURT. That is all."

Thereupon FORREST R. COOK was called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gorovitz as follows:

He lives at 6 Lindley Road, Clifton. He is a buyer employed by William Filene's Sons Company, Boston, in charge of the toy department. He has been buyer of the toy department for six years during which period he was in charge of the purchases of games, toys and puzzles for that store. During the past six years he purchased jig saw puzzles or puzzles of the jig saw type for William Filene's Sons Company. Those jig saw puzzles were not sold in the toy department exclusively. They were also placed on sale in the stationery department.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 1. Now, Mr. Cook, from your experience in the trade would you say that a puzzle or a jig saw puzzle is a game? *A.* No, sir.

Mr. SMITH. I object to that, your Honor. He has not qualified as an expert on what is a game.

Mr. SMITH. May I have an exception?

The COURT. You may have an exception.

Q. 2. What is your answer? *A.* I did not answer. No, it is not a game."

The witness further testified that from his experience as a buyer of toys, games and puzzles and from his knowledge of the terminology of the trade he would define a game as being a contest between two or more people where they play by a set of rules, one hoping to win and the other expecting to lose. Upon interrogation by the court the witness then testified that it would be a natural consequence for one to lose; that the man who would eventually lose would naturally hope to be the winner; that they would both hope to win.

Upon interrogation by plaintiff's counsel the witness then testified that a puzzle or a jig saw puzzle is not a game.

In answer to questions by the court the witness further testified as follows: A puzzle would be more of a problem to be solved. He would classify one of those boards where you shoot a ball and try to see how much of a score you can make as a form of scoring. If two people played it it would be a game, provided there would be a score to make and one could win. That is, having in mind the board, where there is one hole up to 1000 and another 500, but leaving the gambling element out, if two players played it it would be a game.

"The COURT. If one man played it by his lonesome to see how much of a score he could make, you would not call it a game?

The WITNESS. If he played without a set of rules it would come under the classification—

The COURT. The rules are 10 shots to see how much of a shot you can make, and the rest is all skill, the amount of acceleration you apply to the ball.

The WITNESS. With the element of skill and chance in it, it might be called a game.

The COURT. That is all."

Thereupon the witness further testified that toys, games and puzzles are each in a separate and distinct category from the view-point of the trade.

On *cross-examination* the following questions were asked and the following colloquy occurred:

X-Q. 3. Mr. Cook, do you consider the ouija board a game? *A.* No, sir, I do not think it is.

Mr. GOROVITZ. I object to that question, your Honor.

The COURT. I admit it and save your exception.

X-Q. 4. Do you consider a penny or nickel-in-the-slot machine a game?

Mr. GOROVITZ. May I have an exception to that too?

The COURT. You may have it.

Mr. SMITH. He has not answered that yet.

A. I do not think it is a game; no, sir.

Mr. SMITH. That is all."

Thereupon LINWOOD C. CHASE was called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gottlieb as follows:

He lives at 15 Lincoln Road, Wellesley Hills. He was connected with The Viking Manufacturing Company during 1932 and 1933 as treasurer. The Viking Manufacturing Company was organized in 1930. It began to manufacture jig saw puzzles in September or October of 1932. It did not manufacture games or toys in 1932 or at any other time.

Thereupon the witness was handed seven boxes, five of them entitled "Picture Weekly", one entitled "De Luxe Puzzle" and one entitled "Ed Wynn Picture Puzzle", and stated that they were manufactured by The Viking Manufacturing Company during 1932 and 1933. The witness does not recall any puzzles other than these puzzles that were manufactured by the Viking Company in 1932 and 1933. These picture puzzles of the jig saw type were manufactured by his company as follows: Various pictures were selected and backed up by a heavier cardboard and then die cut by steel dies on a power press. In the case of the picture puzzle weekly, his firm always had a different picture each week.

Thereupon seven boxes of puzzles and four pictures were introduced into evidence and marked as "Plaintiff's Exhibit 2".

The witness further testified that The Viking Manufacturing Company ceased to manufacture jig saw puzzles about the time of the bank holiday in 1933, shortly after that; that the manufacturing period lasted for about seven or eight months.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 1. In your opinion, is a jig saw puzzle a game? *A.* No, sir.

Mr. SMITH. I object to that, your Honor.

The COURT. I will allow it.

Mr. SMITH. May I have an exception to that?

The COURT. Yes."

The witness then testified as follows: He says it is not a game because a game, as he interprets it, must be played in the spirit of competition between two or more persons under definite rules of

competition. There are no rules to determine a puzzle solution. Rules are necessary in connection with a game. A game, as he interprets it, must be one of actual competition between two or more persons with certain definite rules of competition. It is a competition of skill or strength or various other things.

He can only judge whether children are as adept as adults in solving puzzles from the children that he has had experience with, and in that case the children were more adept than the adults in his own family and the families of his friends. He would say that children can solve puzzles in excess of 50 pieces.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 2. Now, taking the particular puzzles manufactured by your company, were they particularly designed for any particular class of people?

Mr. SMITH. I object to that, your Honor. They speak for themselves.

The COURT. What is the objection? If I understand the question, were they designed for any particular class of people?

Mr. SMITH. Yes.

The COURT. What is your objection to that?

Mr. SMITH. They speak for themselves.

The COURT. Well, the absence of an intent here may or may not be important. I allow it and save your exception.

A. Our thought was primarily to make them to appeal to children, as evidenced by the fact there are many pieces in these puzzles cut into shapes resembling animals, silhouettes and various figures, and in offering the Ed Wynn puzzles a great many of those subjects chosen were of the type to appeal to children, that is, they were comical or educational.

The COURT. Can you say, Mr. Witness, that you limited yourself to children in designing these puzzles?

The WITNESS. No, your Honor.

The COURT. You made them generally for whoever would buy them, did you not?

The WITNESS. Surely."

The witness then testified as follows: He thinks the fact that they made those animal shapes and various silhouettes is evidence that they were designed to appeal to children and to attract them. He would say that the Ed Wynn puzzles were wholly comical.

They made no return to the Federal Government on jig saw puzzles as games during the month of October or November in 1932; they did not know of any tax on jig saw puzzles. They did not know of any tax on jig saw puzzles of this type. He does not call them jig saw puzzles. He calls them picture puzzles of the jig saw type.

There is a distinct difference between puzzles cut by a jig saw and these die cut puzzles. There is a distinct difference between the real jig saw puzzle which is cut from pieces of wood by a jig saw and these die cut puzzles which are cut by dies from pieces of cardboard, a distinct difference in manufacture and in the product.

These jig saw puzzles contained pieces varying from 162 up to 500 pieces, with some at 200 or 300 or 400 pieces. They varied all the way. The company was guided in that regard by the requirements of the purchasing public. The 162-piece was too easy for the children even. It is correct to say that the puzzles manufactured by his company contained a minimum of 162 pieces and a maximum of 500.

He first learned as treasurer of the Viking Company of a Federal tax on jig saw puzzles as games late in December of 1932. He learned of it in a talk with Mr. Pfau of the local income tax office, who advised them it would be necessary to file a return, and he had at about the same time noticed some articles in the local papers along the same line.

The bulk of their puzzles was sold to individuals all over the United States through the distribution agency of the American News Company. They had a contract by which they were the sole distributors of the company's puzzles. At least 99 percent of the output of picture puzzles was sold through the American News Company under two written contracts.

Thereupon the witness was handed two contracts, one dated November 17, 1932, and the other one dated December 13, 1932,

and identified them as copies of two contracts between his company and the American News Company for the distribution of their product of picture puzzles. The one dated November 17, 1932, is one of two original copies and the letter dated December 13, 1932, which is unsigned, is their copy of the second contract, the copy of the letter which he had previously signed himself. These contracts were then introduced into evidence and marked as "Plaintiff's Exhibit 3".

The witness further testified as follows: When his company made these contracts with the American News Company, Inc. they did not know of any tax on jig saw puzzles as games. Under their contract with the American News Company, Inc. the price they received for the Weekly puzzle from the American News Company after sale had been consummated was 12½ cents, they going to the public at 25 cents a copy. Under their contract they were to charge the American News Company 12½ cents for the Weekly puzzle and the Viking Company paid the freight. Under this extension agreement of December 13, 1932, the price of the Ed Wynn puzzle was 17½ cents and 35 cents to the purchasers. On the De Luxe puzzle the price was 25 cents and 50 cents to the purchaser. At the time these agreements were signed by the American News Company, the Viking Company was ignorant of any tax on jig saw puzzles as games. After December 29, 1932, when they first learned that the Government claimed that jig saw puzzles were games, they made no change in those contracts or in the price. They told the American News Company of this Government tax at the time but they did not attempt to make any change in their agreement with the American News Company. His company thereafter paid the 10 percent tax on the price which they received on the sale of these various puzzles, that is, on the 12½ cents, the 17½ cents and the 25 cents. His company never included the tax in the sale price to the American News Company. It never collected any of these taxes from the American News Company or from anyone. It never passed on the tax on the puzzles to the American News Company or to any purchaser.

ROYCE W. GILBERT was thereupon called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gottlieb as follows:

He lives at 166 Fisher Avenue, Brookline. During 1932 and 1933 he was president of The Viking Manufacturing Company. In September and October of 1932 his company entered upon the manufacture of jig saw puzzles. It ceased to manufacture jig saw puzzles in the spring of 1933. The puzzles which have been introduced in evidence fairly describe and indicate the kind of puzzles which were manufactured by his company, the Weekly, De Luxe and the Ed Wynn puzzles.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 1. In your opinion, is a jig saw puzzle a game? *A.* It is not.

Mr. SMITH. I object to that. He has not qualified as an expert on games, it seems to me.

The COURT. Well, I do not think he has either, but I will let him testify as to his opinion for what it is worth.

Mr. SMITH. Save my exception."

The witness further testified as follows: He says that a jig saw puzzle is not a game because it is a puzzle; there is a distinction between a puzzle and a game. He remembers at one time writing a paper on jig saw puzzles which he did not publish. He found they had a very interesting history, that picture puzzles had been perhaps one of the earliest forms of puzzles. They had been made for literally thousands of years. He thought it has remained for the United States Government to confuse the difference between a puzzle and a game. In all his history or research he never found any reference to a puzzle as a game. There always has been a distinct line between puzzles and games.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 2. Do you recall what books you read, for the moment, in connection with the study? *A.* I found references to picture puzzles under the original—they were originally called Chinese puzzles

because the Chinese made them at an early date and introduced them into Europe before the discovery of America.

The COURT. Will you answer the question giving the names of the books you consulted in making your study?

Q. 3. Where did you find the reference?

The WITNESS. I can't, your Honor, recall the exact references.

The COURT. You can't recall any of the authorities?

The WITNESS. I found references to picture puzzles at the library, in books on, given up to puzzles and games, toys and devices for amusement.

The COURT. But you do not remember the names of any of the books?

The WITNESS. I do not."

The witness then testified that in his opinion children were not as adept as adults in solving puzzles in general but he thinks they are in picture puzzles. His observation has been that children can solve any of the Viking puzzles fully as quickly as the adults.

Thereupon the following colloquy occurred:

"The COURT. How much observation of that nature have you made, *Mr. Gilbert?*

The WITNESS. Why, only the time of the so-called picture puzzle craze when it was at its height; all of our neighbors and friends met together, and I usually, naturally, noticed.

The COURT. What was the point? Did sombody say they did so many a minute or so many an hour, or what?

The WITNESS. We had thousands who wrote in on the making of the puzzle, the people who wrote in to tell how long it took them to make them.

The COURT. They would specify their accomplishments, the time it took them to put these pieces together?

The WITNESS. Yes.

The COURT. So that a child playing the game would say, 'I took 17 minutes', and the parent would say, 'I took 21 minutes'?

The WITNESS. Yes.

The COURT. That is how you drew your conclusion?

The WITNESS. That is part of the observation, and actually watching children in my home and elsewhere.

The COURT. Did you ever watch them, any person or any child of yours or your children together, to see who could do it in the quickest time?

The WITNESS. No, I don't know that I have.

The COURT. Do you know if such things happened?

The WITNESS. Why, I imagine it is logical.

The COURT. That would make it a game, would it not, if two or more persons were trying to see who could do it in the fastest time?

The WITNESS. No, because they could not compete simultaneously.

The COURT. Do you have to compete simultaneously in a game? In a game of baseball you do not. One side is batting while the other is in the field.

The WITNESS. They are both playing the game.

The COURT. That is true. They might be playing a game if they were sitting around a table watching it. Is that the only reaosn you say it is not a game?

The WITNESS. No. I think primarily a game is based on two things. There must be competition and there must be definite rules.

The COURT. There are no rules to cross-word puzzles, are there?

The WITNESS. No.

The COURT. It is just a question of seeing who can do it the fastest.

The WITNESS. I am not an expert on cross-word puzzles.

The COURT. On jig saw puzzles?

The WITNESS. The only competition there could be on the jig saw would be the relative time required by one to put them together but there are no rules. Everyone goes at it by their own methods.

The COURT. You think that rules are essential to the definition of it as a game?

The WITNESS. It seems to me so.

The COURT. If the thing does not have rules it is not a game?

The WITNESS. I have never been able to think of anything I classified as a game that did not have rules."

The witness further testified as follows: He would not say that the difficulty of the jig saw puzzle depends solely on the number of pieces. There are many other factors that would enter into it, that is, size of pieces, shape of cuts.

He was familiar with the contracts made by The Viking Manufacturing Company, dated November 17, 1932 and December 13, 1932, with the American News Company to distribute their entire product. At the time these contracts were made they had no knowledge that jig saw puzzles were subject to a 10 percent tax under the law as games. Under their contract with the American News Company their prices for the puzzles which were produced and manufactured by their company were 12½ cents for the Weekly, 17½ cents for the Ed Wynn and 25 cents for the De Luxe puzzle, minus freight. That is what their contract provided.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 4. Do you know when the Viking Company first learned that the Government claimed a tax on jig saw puzzles as games?

The COURT. The Viking?

Mr. GOTTLIEB. The Viking Manufacturing Company.

The COURT. Is that a corporation?

Mr. GOTTLIEB. Yes.

The COURT. How could it learn anything?

Mr. GOTTLIEB. Through its officers.

The COURT. What officers are you talking about?

Q. 5. Do you know when you first learned, as president of The Viking Manufacturing Company, that the Government claimed a tax on jig saw puzzles as games? *A.* I learned of it the last of December, 1932."

The witness further testified as follows: Thereafter the company paid under protest the tax on jig saw puzzles as games in view of the demand of the Collector of Internal Revenue. Over 99 percent of their output was sold through the American News Company, Inc. After they learned, on or about December 29, 1932, that the Collector of Internal Revenue claimed a tax on jig saw puzzles as games they discussed the tax with the American News Company, Inc. at

the time but they had no result. They never included the tax in the price and never passed it along to or collected it from the American News Company. The taxes which were paid here were paid by The Viking Manufacturing Company.

Thereupon the following questions were asked and the following colloquy occurred:

"*Q.* 6. Do you know who signed the return for these excise taxes paid by the company? *A.* I do not offhand.

Q. 7. Do you know whether you signed them or Mr. Chase? *A.* I do not remember, but my impression is the return had to be signed by both the president and the treasurer of the corporation, so I presume we both signed them.

Mr. GOTTLIEB. I offer them.

Mr. SMITH. We will agree that these are copies of the returns which you have filed. I do not see what the check has to do with it.

Mr. GOTTLIEB. I desire, your Honor, to offer them at this time, four of the monthly returns made by The Viking Manufacturing Company, Inc., in connection with reporting the monthly taxes due on these jig saw puzzles on the claim of the Government that they were taxable as games. Is there any objection?

Mr. SMITH. No.

Mr. GOTTLIEB. They appear to be signed, if your Honor please, just 'Viking Manufacturing Company, 31 St. James Avenue, Boston, Mass.' and cover four of the items set forth in the declaration, namely, $2,682.67, $6,826.05, $10,519.50 and $16,341.55."

Thereupon the four monthly returns were introduced into evidence and marked as "Plaintiff's Exhibit 4".

A. HOMER HATHAWAY was then called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gorovitz as follows:

He lives in Wollaston, Mass. He is employed by Chase & Gilbert as an accountant. During the years 1932 and 1933 he was connected with The Viking Manufacturing Company in the capacity of accountant and was in charge of their books and records. He prepared the monthly returns of excise taxes in connection with the manufacture

and sale of these various puzzles. The following procedure was adopted with respect to billing the American News Company for the shipments of these puzzles: The Boston office was advised by a shipping notice of the quantity of puzzles shipped to the American News Company and on receipt of the shipping notice the bill was shipped to the American News Company giving the quantity, the number of the puzzle, the cartons, the price, the amount and the type of puzzle. In billing the American News Company they did not state on the invoice the amount of the tax and there was no reference to the tax.

Thereupon the following colloquy occurred:

"The COURT. You need no further evidence that the tax was not passed along. You have sufficient in there now.

Mr. GOROVITZ. What is that, your Honor?

The COURT. I say, you need no further evidence that the tax was not passed along.

Mr. GOROVITZ. We feel, your Honor, that the mere method of billing is not conclusive, in the light of several decisions which have been handed down by the United States Supreme Court; and, the burden of proof being what it is, we feel that every bit of evidence that we can introduce respecting the manner of treatment of this tax by the company is also important.

The COURT. You are not going to ask me to pass on it?

Mr. GOROVITZ. No, your Honor, but we thought that we ought to show samples of invoices and manner of billing.

The COURT. For what purpose? To convince the court of something of which it is already convinced?

Mr. GOROVITZ. No, your Honor. I will withdraw it.

The COURT. All right, go ahead.

Mr. GOROVITZ. That being the case, your Honor, I think we do not need any more evidence on this question of the tax having been passed on, and I will discontinue with this witness.

Mr. SMITH. I have no questions."

DAVID ADAMS was then called as a witness for the plaintiff and, having been first duly sworn, testified on *direct examination* by Mr. Gorovitz as follows:

He lives in Belmont and is manager of the Curtis Publishing Company. During the years 1932 and 1933 he was in the business of manufacturing jig saw puzzles. He was connected with the University Distributing Company, who were manufacturers of picture puzzles of the jig saw type. He had a stock interest in the company and at one time was an official of the company holding office as president.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 1. Well, now, Mr. Adams, in your opinion is a jig saw puzzle a game? *A.* No, sir.

Mr. SMITH. I object to that, if your Honor please.

The COURT. What is his qualification, briefly?

Mr. GOROVITZ. He is a manufacturer of jig saw puzzles.

The COURT. When did he say he was president of this concern?"

The witness thereupon testified that he was president of the University Distributing Company when it was first incorporated in 1932 and subsequently he held the office of treasurer. He was connected with the University Distributing Company from 1932 on and is still connected with that company.

Thereupon the following question was asked and the following colloquy occurred:

"*Q.* 2. Well, now, Mr. Adams, is a picture puzzle of the jig saw type a game, in your opinion?

Mr. SMITH. I object to that, your Honor.

A. No, sir.

The COURT. I will allow it and save your exception."

The witness then testified that from his experience as a manufacturer of jig saw puzzles he would say that a jig saw puzzle, in his opinion, is similar to a cross-word puzzle. It is a puzzle. A game is a variable outcome. A game is one that requires two or more to play it. A jig saw puzzle is a puzzle in the true sense of the word.

It is not a game. We call politics a game. We call most anything a game. A game is used in a lot of cases where it really isn't meant to be used.

He would say that the difficulty of a picture puzzle of the jig saw type does not solely depend on the number of pieces contained in the puzzle. The difficulty of a puzzle of this type might be dependent upon other factors in so far as the coloring of the picture is concerned, or the size of the pieces, but the size and number of the pieces is just a matter of continuation. It makes the puzzle just like a book. A long book takes a longer time to read than a short one. He would say that the manner of cutting up the picture, the nature of the shape of the individual pieces, is also a factor in determining the difficulty of a puzzle.

Thereupon the following questions were asked by the court and by counsel and the following answers given:

"The COURT. So that, Mr. Witness, if you restricted this to 50 pieces or below, you could still make a game by using colors or varied sizes and shapes more difficult than a game over 50?

The WITNESS. By restricting it to 50 and by using colors and pieces of variable sizes you can make it more difficult than one over 50?

The COURT. Which did not have the colors?

The WITNESS. Yes, very easily.

Q. 3 (Mr. Gorovitz). Would you say that children are as adept as adults in solving puzzles of the jig saw type?

The COURT. What experience has he had in determining that, first.

Q. 4. First, have you observed at all children and adults working out these puzzles? *A.* My own children, I have.

Q. 5. Have you seen them working out these puzzles? *A.* Why, I have.

The COURT. The same puzzle?

The WITNESS. Yes, the same puzzle. Just last night my boy was working on a puzzle, and the two children were working on it; they were putting them together better than I could. They are more adept at it than I am.

The COURT. They were working under similar conditions at about the same time?

The WITNESS. Gathered around the table.

The COURT. One would try it and the other would try it?

The WITNESS. Oh, no; they would work all together; just a combination, just a puzzle, putting it together.

The COURT. They were all working together?

The WITNESS. Oh, yes.

Mr. GOROVITZ. I think that is all.

Mr. SMITH. No questions."

Thereupon the following offer was made by counsel for the plaintiff and the following colloquy occurred:

"Mr. GOTTLIEB. If your Honor please, I should like to offer at this time in evidence Regulations 47, which was revised December, 1920, relating to the excise taxes on sales by the manufacturer under Section 900 of the Revenue Act of 1918. Section 900, sub-section 5 thereof, is the law which was practically identical with the provisions of the present law.

Mr. SMITH. I object to that, your Honor. We are considering now the 1932 statute.

The COURT. Is it the same in all respects?

Mr. GOTTLIEB. *Practically. I am quite certain* it is the same. I have not read it recently. It is offered for two purposes: First, because it is under the title of Sporting Goods, and the Commissioner at that time issued a regulation in which he as much as intimated that the word 'games' included games more nearly connected with sports; and, while I offered evidence before as to whether or not we paid any tax in 1919, 1920 and 1921, when jig saw puzzles were exempt under that statute, and your Honor excluded it and said you would take judicial notice of the fact, it has just been called to my attention that there is a line of decisions which hold that where a Federal statute has been given a definite interpretation for a period of years, upon a reenactment of the statute by Congress it is probable that Congress intended reenactment of the regulations controlling administrative practice.

The COURT. If you can show that that particular statute is identi-

cal with this present statute, I will admit it. If there is the slightest change, I will not admit it.

Mr. GOTTLIEB. May we have two minutes to compare it now?

The COURT. Yes.

[Counsel make comparison.]

Mr. SMITH. It is not exactly the same, your Honor.

Mr. GOTTLIEB. The material part for our case is 'games and parts of games (except playing cards and children's toys and games), and all similar articles commonly or commercially known as sporting goods, ten per centum"—I say that is absolutely identical.

The COURT. What is the difference in the two statutes?

Mr. GOTTLIEB. They eliminate one or two words of description —'Tennis racket frames, strings, rubber covers and presses'—that is about all. There is just a slight change of verbiage but it is essentially our manufacture and covers the 10 percent which we were assessed. It is the identical statute, in my opinion.

The COURT. The only difference is leaving out tennis rackets?

Mr. GOTTLIEB. Tennis racket frames and strings and one or two others. Everything else has been covered, the vital part as far as our case is concerned.

The COURT. I will receive it."

Regulations 47, revised December, 1920, relating to excise taxes on sales by the manufacturer under section 900 of the Revenue Act of 1918, was thereupon introduced into evidence and marked as "Plaintiff's Exhibit 6".

Thereupon the plaintiff rested.

In behalf of the defendant there was introduced into evidence a certified copy of a letter from David Burnet, Commissioner, to C. S. Hammond & Company, Inc., dated February 7, 1933, which letter was marked as "Defendant's Exhibit A". Thereupon a certified copy of a letter, dated April 20, 1933, from R. M. Estes to C. S. Hammond & Company, Inc. was introduced into evidence and marked "Defendant's Exhibit B". Said letters were then read into the record and read as follows:

DEFENDANT'S EXHIBIT A.

UNITED STATES OF AMERICA.
TREASURY DEPARTMENT.

Washington December 26, 1935

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of letter dated February 7, 1933, to C. S. Hammond and Company, Incorporated, Brooklyn, New York, from David Burnet, Commissioner, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFIELD,
Chief Clerk, Treasury Department.

[SEAL]

WB W W Bamr WWB DAT HO

MT:ST:MR

Feb 7 - 1933

C. S. Hammond & Co., Inc., 360 Furman St., Brooklyn, New York.

Attention: Mr. Chas, H. Bogert, Treas.

Gentlemen: Reference is made to your letter of January 28, 1932, in which information is requested relative to the taxability of jig-saw and picture puzzles under section 609 of the Revenue Act of 1932.

You are advised that this office now holds that jig-saw puzzles, or die cut picture puzzles, containing more than 50 pieces are considered games and subject to the tax imposed by section 609 of the Revenue Act of 1932. Jig-saw puzzles or die cut picture puzzles containing 50 pieces or less are considered children's games and are therefore subject to the exemption allowed under section 609 of the Act.

Due to the fact that in office letter of August 26, 1932, you were notified that jig-saw puzzles were not subject to the tax imposed

under section 609 of the Act, the ruling as stated above will be effective as of the date of this letter. All sales of taxable puzzles made on or after the date of this letter are therefore subject to the tax imposed by section 609 of the Revenue Act of 1932.

Respectfully,

MBC DAVID BURNET, Commissioner.

cc–Brooklyn, N. Y.
cc–Capt. Bliss
N. MD DSB CmE PPB WG.

DEFENDANT'S EXHIBIT B.

UNITED STATES OF AMERICA.
TREASURY DEPARTMENT.

Washington December 26, 1935

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of letter dated April 20, 1933, to C. S. Hammond and Company, Incorporated, Brooklyn, New York, from R. M. Estes, Deputy Commissioner, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFIELD,

[SEAL] Chief Clerk, Treasury Department.

MB WWB amr WWB DAT HO

MT:ST:MR Apr 20 1933

C. S. Hammond & Co., Inc., 358 Furman St., Brooklyn, New York.

Gentlemen: To avoid any possibility of a misunderstanding that might exist among the manufacturers of jig-saw or cardboard die cut picture puzzles as to the taxability of these articles under Section 609 of the Revenue Act of 1932, the following ruling relative thereto has been issued by this office.

Jig-saw or cardboard die cut picture puzzles containing more than 50 pieces are considered games and subject to the tax imposed by Section 609 of the Revenue Act of 1932. Jig-saw or cardboard die cut picture puzzles containing 50 pieces or less are considered children's games and are therefore subject to the exemption allowed under Section 609 of the Act.

The tax is effective on all sales of taxable puzzles made on or after June 21, 1932, by the manufacturer thereof and is based upon the manufacturer's sale price.

Respectfully,

R. M. ESTES,

Deputy Commissioner.

EHG

cc–Brooklyn, N. Y.

cc–Capt. Bliss

MH DSB

Thereupon it was agreed by counsel in open court that the first date when the Commissioner ruled that jig saw puzzles were taxable was November 14, 1932.

During the course of the closing argument by counsel for the plaintiff the following ruling was made by the court:

"Mr. GOROVITZ. In view of the ruling made by your Honor as to the issue of fact, I do not think we need to discuss the law of it at the present time.

The COURT. On the question of passing this tax on I will rule at this time that you did not pass the tax along."

All of the exhibits hereinabove referred to, except such exhibits as are set out in this bill of exceptions, and such as are omitted from the record by stipulation of the parties, appear elsewhere in the record and are expressly incorporated herein and made a part hereof by reference, as if the same were set out herein in full.

The foregoing, together with the exhibits, comprises all the material evidence adduced at the trial of this cause.

Thereafter, on January 14, 1936, the plaintiff filed a motion for a special finding of the facts and a motion for judgment. These motions appear elsewhere in the record of this case and are expressly incorporated herein and made a part hereof by reference.

On the same day the plaintiff submitted requests for rulings of law and findings of fact, to wit:

PLAINTIFF'S REQUESTS FOR RULINGS OF LAW.

Now comes the plaintiff in the above-entitled cause and respectfully moves the court to make the following rulings of law during the progress of the trial:

1. Upon all the evidence the plaintiff is entitled to recover.

2. Upon all the law of this case the plaintiff is entitled to recover.

3. Upon all the law and the evidence the plaintiff is entitled to recover.

4. The provisions of a taxing statute are not to be extended by implication beyond the clear import of its language nor is its operation to be enlarged so as to embrace matters not specifically pointed out. Where doubt exists in construction, that doubt is to be resolved in favor of the taxpayer and that construction is adopted which is most strongly against the claim made by the taxing power and in favor of the citizen.

United States v. *Merriam,* 263 U. S. 179, 187, 188, 44 S. Ct. 69, 71, 68 L. Ed. 240.

Gould v. *Gould,* 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211.

American & La France Fire Engine Co. v. *Riordan,* 6 F. (2d) 164.

Iselin v. *United States,* 270 U. S. 245.

5. The phrase "games and parts of games", as used in Section 609 of the Revenue Act of 1932, is too vague, equivocal, indefinite and ambiguous to include within its application picture puzzles of the type manufactured by The Viking Manufacturing Company, Inc.

6. The phrase "games and parts of games", as used in Section 609 of the Revenue Act of 1932, is to be interpreted with reference to the class of products with which it is associated and since this phrase follows words of particular and specific meaning, it should not be construed in the broader sense, but as applied to products of the same general class as those specifically mentioned.

Phez Co. v. *United States,* 25 F. (2d) 1011.
Virginia v. *Tenn.,* 148 U. S. 519.

7. The meaning of words used in a taxing statute directed at "manufacturers, producers or importers" of certain articles is governed by the language or terminology of the trade or business in which such "manufacturers, producers or importers" are engaged.

8. As Section 609 of the Revenue Act of 1932 is directed at "manufacturers, producers or importers" of "games and parts of games", the last quoted words cannot be construed as including jig saw puzzles and picture puzzles of the jig saw type, because in the terminology of such manufacturers, producers and importers the words "games and parts of games" do not include jig saw puzzles and picture puzzles of the jig saw type.

9. The test to be applied in determining whether or not a jig saw puzzle is a "game" within the meaning of Section 609 of the Revenue Act of 1932 is whether or not a jig saw puzzle is designed or primarily adapted for use as a game.

Universal Battery Co. v. *United States,* 281 U. S. 580.

10. Sales by a manufacturer of jig saw puzzles are not taxable under Section 609 of the Revenue Act of 1932.

11. The picture puzzles of the jig saw type manufactured by The Viking Manufacturing Company, Inc. are not "sporting goods" for "games" within the meaning of Section 609 of the Revenue Act of 1932 and are not subject to tax under said section.

12. Sales by a manufacturer of picture puzzles primarily designed for and adapted to use by children are not taxable under the provisions of Section 609 of the Revenue Act of 1932.

13. The presumption in Article 11 of Regulations 46 relating to excise taxes on sales by the manufacturer under the Revenue Act of 1932, that where no separate charge is made as a tax it will be presumed that the tax is included in the price charged for the article, is arbitrary, unreasonable and confiscatory and violates the Fifth Amendment to the Constitution of the United States.

14. The regulation or ruling of the Commissioner of Internal Revenue that a jig saw puzzle containing more than 50 pieces is sub-

ject to tax as a game under Section 609 of the Revenue Act of 1932, is arbitrary and unreasonable and constitutes an improper and discriminatory classification in violation of the Fifth Amendment to the Constitution of the United States.

15. Where a taxing statute has been given a definite administrative interpretation for a period of years, upon re-enactment of the statute by Congress substantially without change it will be assumed that the statute was re-enacted with congressional approval of the administrative practice and interpretation.

16. An excise tax on sales by a manufacturer is laid and remains on the manufacturer and on him alone.

Lash's Products Co. v. *United States,* 278 U. S. 175.
Heckman & Co. v. *I. S. Dawes & Son Co.,* 12 F. (2d) 154.

17. The tax on sales imposed on the manufacturer by Section 609 of the Revenue Act of 1932, being a tax on the manufacturer alone, accurately speaking cannot be passed on to the purchaser.

Lash's Products Co. v. *United States,* 278 U. S. 175.

18. Upon all the evidence, The Viking Manufacturing Company, Inc. did not include the tax in the price at which its picture puzzles were sold and did not collect the amount of the tax from the vendee.

19. Section 621 (d) of the Revenue Act of 1932 violates the due process clause of the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

SAMUEL GOTTLIEB,
ISRAEL GOROVITZ,
Attorneys for Plaintiff.

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT.

Now comes the plaintiff in the above-entitled cause and respectfully requests the court to find the following facts:

1. The plaintiff is, and was at all times material, a resident of Brookline, County of Norfolk in the Commonwealth of Massachusetts, and a citizen of the United States.

2. The Viking Manufacturing Company, Inc. is a corporation duly

organized under the laws of Massachusetts and formerly having its usual place of business in Boston, County of Suffolk in said Commonwealth.

3. Said corporation was engaged in the business of manufacturing picture puzzles of the jig saw type.

4. On or about September 29, 1934, The Viking Manufacturing Company, Inc. was duly adjudicated a bankrupt upon a voluntary petition filed in this court and thereafter, on October 23, 1934, the plaintiff was appointed its trustee in bankruptcy.

5. The defendant, Thomas W. White, is a resident of Newton, in the County of Middlesex in said Commonwealth, and was, from December 1, 1925 to August 31, 1933, the duly appointed Collector of Internal Revenue of the United States of America for the District of Massachusetts.

6. Pursuant to the provisions of Section 609 of the Revenue Act of 1932 and the regulations issued thereunder, The Viking Manufacturing Company, Inc. duly filed with the defendant its returns of gross monthly sales of the jig saw puzzles manufactured by it covering the period from June 21, 1932 to May 1, 1933, and duly paid thereon to the defendant the total sum of $37,021.63 on the following dates and in the following amounts:

Date.	Amount.
January 30, 1933	$3,075.13
February 16, 1933	259.40
February 27, 1933	6,826.05
March 31, 1933	10,519.50
May 1, 1933	16,341.55
Total	$37,021.63

7. On or about March 16, 1935, the plaintiff duly filed with the Collector of Internal Revenue then in office a claim for refund of the said sum of $37,021.63, setting forth as grounds therefor, among others, the following:

(a) That the jig saw puzzles manufactured by The Viking Manufacturing Company, Inc. were not "sporting goods" or "games" within

the meaning of Section 609 of the Revenue Act of 1932 and were therefore not subject to tax under that section.

(b) That the articles manufactured by it were children's toys or games expressly exempt from taxation under the provisions of said section.

(c) That the regulation or ruling of the Commissioner of Internal Revenue exempting from taxation under Section 609 of the Revenue Act of 1932 only such jig saw puzzles as contained 50 pieces or less is arbitrary, unreasonable and discriminatory in its application to The Viking Manufacturing Company, Inc. and all other manufacturers of jig saw puzzles containing in excess of 50 pieces and that said regulation or ruling constitutes an improper and discriminatory classification in violation of the Fifth Amendment to the Constitution of the United States.

(d) That Article 11 of Regulations 46 relating to excise taxes on sales by the manufacturer under Sections 602–611, inclusive, 613 and 614 of the Revenue Act of 1932, in providing for a presumption that where no separate charge is made as a tax it will be presumed that the tax is included in the price charged for the article, adopts a presumption which is arbitrary, unreasonable and confiscatory, in violation of the Fifth Amendment to the Constitution of the United States.

(e) That The Viking Manufacturing Company, Inc. at no time included the tax in the price of the article with respect to which it was allegedly imposed under said Section 609 and did not collect the amount of said tax from the vendee.

8. Said claim for refund was disallowed and rejected by the Commissioner of Internal Revenue on May 27, 1935, and the amount therein claimed has never been repaid to the plaintiff.

9. Picture puzzles of the type manufactured by The Viking Manufacturing Company, Inc., or related types, have been known for at least 100 years and have been manfactured for at least 75 years.

10. "Jig saw" puzzles are not "games" within the meaning of Section 609 of the Revenue Act of 1932.

11. "Jig saw" puzzles are not "sporting goods" within the meaning of Section 609 of the Revenue Act of 1932.

12. The picture puzzles manufactured by The Viking Manufac-

turing Company, Inc. were primarily designed for, and adapted to use by children.

13. The picture puzzles manufactured by The Viking Manufacturing Company, Inc. were not adult games.

14. The picture puzzles manufactured by The Viking Manufacturing Company, Inc. contained approximately 162 pieces as a minimum and 500 pieces as a maximum.

15. The Viking Manufacturing Company, Inc. sold practically all of its puzzles on consignment to the American News Company, Inc. under a contract dated November 17, 1932, as extended on December 13, 1932. It made three types of puzzles—a Picture Puzzle Weekly, an Ed Wynn puzzle and a De Luxe puzzle.

16. Under the terms of the contract these puzzles were sold by The Viking Manufacturing Company, Inc. at 12½ cents for the Picture Puzzle Weekly, 17½ cents for the Ed Wynn puzzle and 25 cents for the De Luxe puzzle and it was agreed that these puzzles were to retail at 25 cents, 35 cents and 50 cents, respectively.

17. The Viking Manufacturing Company, Inc. did not know of the existence of a tax on picture puzzles until on or about December 29, 1932, and the contracts which it made with the American News Company, Inc. were executed in ignorance of the existence of any such tax.

18. No allowance was made in these contracts for the inclusion of the tax in the sales price agreed upon therein and at no time did The Viking Manufacturing Company, Inc. include the tax in the price of the puzzles which it sold or collect the amount of the tax from the vendee.

19. The amount of the tax paid by The Viking Manufacturing Company, Inc. was not separately billed or stated in its invoices and no adjustment was made in its price to include the amount of the tax.

20. The taxes paid by The Viking Manufacturing Company, Inc. on sales by it of jig saw puzzles during the months of October 1932 to and including March 1933, were computed on the basis of 10 percent of the price stated in the invoices.

21. In the terminology of the trade, a game is a contest of two

or more people with an element of competition according to a set of rules, where the result is uncertain and there is a winner and a loser.

22. In its common, ordinary and accepted meaning, a game is a contest of two or more people with an element of competition according to a set of rules, where the result is uncertain and there is a winner and a loser.

23. Although the word "game" is sometimes used in common parlance to designate an amusement, pastime, diversion or recreation, in its most common and ordinarily accepted meaning it is used to designate a contest of two or more sides with an element of competition according to a set of rules, where the result is uncertain and there is a winner and a loser.

24. "Toys", "games" and "puzzles" constitute three separate and distinct types or categories of amusement devices, in the terminology of the trade.

25. In their common, ordinary and accepted meaning, "toys", "games" and "puzzles" constitute three separate and distinct types or categories of amusement devices.

26. Children are as adept as adults in solving picture puzzles of more than fifty pieces.

27. Children solved the picture puzzles manufactured by The Viking Manufacturing Company, Inc. with facility equal to that of adults.

28. During the effective period of Section 900 (5) of the Revenue Act of 1918, from February 25, 1919 to December 31, 1921, jig saw puzzles were manufactured and sold and were not taxed by the Commissioner of Internal Revenue.

29. The Commissioner of Internal Revenue ruled on August 26, 1932, that jig saw puzzles were not subject to tax under Section 609 of the Revenue Act of 1932, but on February 7, 1933, he ruled:

> ". . . that this office now holds that jig-saw puzzles, or die cut picture puzzles, containing more than 50 pieces are considered games and subject to the tax imposed by section 609 of the Revenue Act of 1932."

And that:

". . . the ruling as stated above will be effective as of the date of this letter. All sales of taxable puzzles made on or after the date of this letter are therefore subject to the tax imposed by section 609 of the Revenue Act of 1932."

30. On all the evidence it appears that no manufacturers' excise tax with respect to sales of jig saw puzzles was paid to the Collector of Internal Revenue under the provisions of Section 609 of the Revenue Act of 1932 prior to the promulgation of S. T. 567 in November, 1932, although the provisions of the 1932 Revenue Act took effect as of June 21, 1932.

Respectfully submitted,

SAMUEL GOTTLIEB,
ISRAEL GOROVITZ,
Attorneys for Plaintiff.

Thereafter on February 19, 1936, the hearing was resumed and the court, in the presence of counsel for both parties, made the following findings and rulings, to which the plaintiff's exceptions were duly saved, to wit:

"The COURT. In the case of *Aronson* v. *White*, I find for the defendant and file an opinion herewith. Plaintiff's motion for judgment is denied. Defendant's request for rulings of law is granted. Plaintiff's refuests for rulings of law are allowed, in so far as they are consistent with this opinion and denied, in so far as they are inconsistent. Plaintiff's request for findings of fact are similarly allowed, in so far as they are consistent with this opinion. Judgment may be entered for the defendant.

Mr. GOROVITZ. If your Honor please, our exceptions are saved to these rulings?

The COURT. They will be if you ask to have them. Exceptions may be saved and are noted on the record to the disallowance of all requests; I assume that is from the disallowance of all motions and requests.

Mr. GOROVITZ. And as to any requests for findings of fact and rulings of law which you have denied.

The COURT. Yes."

The plaintiff thereupon requested the court to rule specifically on each of the plaintiff's requests for findings of fact and rulings of law, which request was denied, and the plaintiff's exception to the refusal of the court so to do was duly saved.

The plaintiff, being aggrieved by all and singular the adverse decision, orders and rulings of the court as hereinbefore set forth, to which his exceptions were duly saved, presents the foregoing as his bill of exceptions and prays that the same may be allowed and made a part of the record in said cause by this Honorable Court, pursuant to the law and rules of the court in such cases made and provided.

Respectfully submitted,

PHILIP J. ARONSON,
as he is Trustee in Bankruptcy of The
Viking Manufacturing Company, Inc.,
by his Attorneys,
SAMUEL GOTTLIEB,
ISRAEL GOROVITZ.

The defendant hereby assents to the allowance of the foregoing as and for the plaintiff's bill of exceptions.

FRANCIS J. W. FORD, *United States Attorney,*
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

The foregoing is allowed as and for the plaintiff's bill of exceptions this fifth day of June, 1936. GEORGE C. SWEENEY,
District Judge.

[MEMORANDUM. Plaintiff's Exhibit 1 is here omitted as it is set out at length on page 20 of the plaintiff's bill of exceptions in this Transcript of Record. JAMES S. ALLEN, *Clerk.*]

PLAINTIFF'S EXHIBIT 3.

AGREEMENT.

We hereby appoint The American News Company, Inc. exclusive agents for supplying

THE PICTURE PUZZLE WEEKLY.

to the trade and agree not to sell any Puzzles to any other person or concern while this agreement is in effect, it being understood that we are to dispose of any accumulated returns to the best possible advantage, but we agree not to dispose of the returns in any way that may interfere with the sale of the current issues of The Picture Puzzle Weekly.

The distribution is to be made on the following terms:

1. A new Puzzle to be issued weekly.
2. Cost to The American News Company, Inc. 12½c. each, f. o. b. the News Company branches in the various cities.
3. Trade price to be 19c.—Retail 25c.
4. Transportation:
   - A. Where shipments are made by The American News Company, Inc. to its branches, it is understood that we are to assume and accept charges for all transportation.
   - B. It is understood also that we are to assume and pay for all transportation on shipments of unsold numbers or returns made by The American News Company, Inc. or its branches to any designated branches for accumulation. And in addition,
   - C. Pay all additional transportation on re-shipments of such accumulated copies, which will be in the nature of new consignments.
   - D. We will also pay The American News Company, Inc. a handling charge on shipments made to their branches, it being understood that such handling charge is included in the transportation and handling rates submitted by them, and hereby accepted by us.
5. It is further agreed that all unsold Puzzles, regardless of their

condition, will be accepted for full credit and transportation paid on the shipments of returns, as outlined in Paragraph 4.

6. We agree to reimbuse The American News Company, Inc. for the cost of distributing our advertising matter, at a rate of not over $4.00 per M. The total cost of distribution to be spread over a three week period; that is, one-third of the cost is to be charged against the payment due us for the first issue, one-third against the second issue and the balance against the third issue.

7. The American News Company, Inc. is to make settlement for the first number after the receipt and distribution to retail dealers of the sixth number, less all accrued charges on the account up to the date of settlement. All subsequent numbers to be settled for on the same basis.

8. In case the Puzzle Weekly is discontinued or the agency relinquished, The American News Company, Inc. is to make such approximate settlement from time to time thereafter as the sales in their judgment may warrant and final settlement four months after the date of notice to dealers to return unsold numbers.

9. In the event of our not taking into our custody all unsold numbers within six months of release date, we authorize The American News Company, Inc. to dispose of all unsold numbers for what they will bring and place the proceeds to our credit.

10. We agree to furnish The American News Company, Inc. a full account in detail of all numbers delivered to them.

11. It is understood that The American News Company, Inc. may relinquish this agency upon giving thirty days notice in writing, except that The American News Company, Inc. may, in its own discretion, terminate this agreement and relinquish the agency at any time with or without prior notice in the event that the Puzzles may be an infringement of patent or copyright, or in any way appear to be a violation of law. It is agreed that The American News Company, Inc. shall not be liable for refusal to carry out the terms of this contract because of such objectionable features.

VIKING MANUFACTURING CO., INC.

November 17, 1932. ROYCE W. GILBERT.

(Copy)

December 13, 1932.

American News Company, 131 Varick Street, New York, N. Y.

Attention: Mr. P. D. O'Connell

Gentlemen: Confirming various telephone conversations relative to your distribution of the remaining first issue of the so-called Ed Wynn Series of picture puzzles, these puzzles are to retail at 35c. each, and are to be billed to you at 17½c. each, we to pay transportation charges, etc. similar to the arrangement on our picture puzzle weekly.

We have on hand some 75,000 to 80,000 of these pictures ready to be cut into puzzles. As soon as this issue is completed it is our intention to close out this series. We would, therefore, request that you keep them on your stands in an attempt to reach as nearly as possible a 100% sale.

Kindly advise us if the above corresponds with your understanding of the arrangement which in all respects other than price is to be governed by our contract with you on the Picture Puzzle Weekly.

Very truly yours,

VIKING MANUFACTURING CO. INC.

LCC:O by:

On the thirteenth day of July, A. D. 1936, a petition for appeal from the aforementioned judgment was filed by the plaintiff and allowed by the court on the same day.

PLAINTIFF'S ASSIGNMENT OF ERRORS.

[Filed July 13, 1936.]

The plaintiff in this action, Philip J. Aronson, as he is trustee in bankruptcy of The Viking Manufacturing Company, Inc., in connection with his petition for appeal, makes the following assignment of errors which he avers occurred in the trial, record and proceedings in this cause in the District Court and in the rendition of the judgment against the plaintiff appearing of record herein:

1. The court erred in denying the plaintiff's motion for judgment.

2. The court erred in granting the defendant's motion for judgment.

3. The court erred in denying the plaintiff's motion for a special finding of the facts.

4. The court erred in denying the plaintiff's requests for findings of fact in so far as they are inconsistent with its opinion rendered herein.

5. The court erred in granting the defendant's request for a ruling of law.

6. The court erred in denying the plaintiff's requests for rulings of law in so far as they are inconsistent with its opinion rendered herein.

7. The court erred in denying the plaintiff's request that it rule specifically on each of the plaintiff's requests for findings of fact and rulings of law.

8. The court erred in denying and refusing to grant each and every request of the plaintiff for a ruling of law, which requests, numbered 1 to 19, both inclusive, appear in the bill of exceptions and are incorporated herein by reference.

9. The court erred in denying and refusing to grant each and every request of the plaintiff for a finding of fact, which requests, numbered 1 to 30, both inclusive, appear in the bill of exceptions and are incorporated herein by reference.

10. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

> "*Q.* From your knowledge and experience in the trade, would you say that a ruling that all jig saw puzzles having 50 pieces or less are children's games, and all jig saw puzzles having more than 50 pieces are adult games,—would you say that ruling is a reasonable one as a matter of fact?"

11. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

> "*Q.* When information first came to your knowledge of this

tax under the Revenue Act of 1932, were you of the opinion that the word 'games' comprehended and included jig saw puzzles?"

12. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

"*Q.* Did you as a manufacturer of jig saw puzzles make any monthly reports as required by law?"

13. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

"*Q.* Do you remember when Parker Bros. first made its return to the Collector of Internal Revenue on jig saw puzzles as games?"

14. The court erred in ruling that it did not care how the trade felt about the meaning of the word "games".

15. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

"*Q.* Did Parker Bros. manufacture cross word puzzles in 1932 and 1933?"

16. The court erred in striking out the answer of the witness George S. Parker to the following question on direct examination:

"*Q.* Did your company pay any taxes on jig saw puzzles as games during the years 1919, 1920 and 1921?"

17. The court erred in excluding the testimony of the witness George S. Parker, on direct examination, in answer to the following question:

"*Q.* Do you know whether the trade generally paid any taxes during 1919, 1920 and 1921 on jig saw puzzles?"

18. The court erred in admitting the testimony of George S. Parker, on cross-examination, as to how many players a ouija board has.

19. The court erred in admitting the testimony of Forrest R. Cook, on cross-examination, as to whether or not he considers a ouija board a game.

20. The court erred in admitting the testimony of Forrest R. Cook, on cross-examination, as to whether or not he considers a penny or nickel-in-the-slot machine a game.

PHILIP J. ARONSON,
as he is Trustee in Bankruptcy of The
Viking Manufacturing Company, Inc.,
by his Attorneys,
SAMUEL GOTTLIEB,
ISRAEL GOROVITZ.

A bond on appeal in the sum of two hundred fifty dollars ($250) was filed by the plaintiff on the thirteenth day of July, A. D. 1936, the Fidelity and Deposit Company of Maryland acting as surety. Said bond on appeal was approved by the court on the same day.

A citation on appeal was issued on the thirteenth day of July, A. D. 1936, being made returnable in the United States Circuit Court of Appeals on the twelfth day of August, A. D. 1936.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the plaintiff, including true copies of such proofs, entries and papers on file as have been agreed upon, in the cause entitled,

No. 6463, Law Docket,

PHILIP J. ARONSON, Trustee in Bankruptcy of
THE VIKING MANUFACTURING COMPANY, Inc., Plaintiff,

v.

THOMAS W. WHITE, Individually, and as Former Collector of Internal Revenue, Defendant.

in said District Court determined.

And I further certify that transmitted herewith are the originals of the petition for appeal, the bond on appeal, and the citation on appeal with the acknowledgment of service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this tenth day of August, A. D. 1936.

[SEAL] JAMES S. ALLEN, *Clerk.*

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On October 16 and 20, 1936, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the fifth day of January, A. D. 1937, the following Opinion of the Court was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3171. October Term, 1936

PHILIP J. ARONSON, TRUSTEE, PLAINTIFF, APPELLANT

v.

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT, APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the Court

January 5, 1937

BINGHAM, J.: Philip J. Aronson, trustee in bankruptcy of the Viking Manufacturing Company, Inc., brought this action at law, in the federal District Court for Massachusetts, against Thomas W. White, individually and as former Collector of Internal Revenue, to recover $37,021.61, paid on or before April 30, 1933, as taxes assessed on jig saw picture puzzles manufactured and sold by the Viking Company. The case was tried by the court, a jury being waived in writing, who found for the defendant and entered judgment, from which the plaintiff appealed.

The taxes were assessed under Section 609 of the Revenue Act of 1932 (47 Stat. 264), which reads as follows:

"Sec. 609. Tax on Sporting Goods.

"There is hereby imposed upon the following *articles*, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: *Tennis rackets*, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, *polo* mallets, *baseball* bats, gloves, masks, protectors, shoes and uniforms, *football* helmets, harness and uniforms, *basket ball* goals and uniforms, *golf* bags and clubs, *lacrosse* sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, *billiard* and *pool tables*, *chess* and *checker* boards and pieces, *dice*, *games and parts of games* (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods." [Italics supplied.]

The defendant takes the position that a jig saw picture puzzle is a game within the meaning of that word as used in the above section and falls within its broad definition of "an amusement or diversion." Webster's New International Dictionary.

The plaintiff contends, on the other hand, for a more restricted definition; that the word "game" means "a contest, physical or mental, according to certain rules, for amusement, recreation, or for winning a stake" (Webster's New International Dictionary), requiring the participation of two or more persons; that a jig saw picture puzzle does not come within its terms, and is designed for use by one person and without competition or rules.

The parties concede that the phrase "games and parts of games" mean the articles or instrumentalities used in games and in parts of games, and that it is these articles or instrumentalities the sale of which was to be taxed. It is under this description (games and parts of games) that the jig saw picture puzzles here in question were held taxable by the court below, the theory being that the putting together of a jig saw picture puzzle was an amusement or diversion and, therefore, a game, although it involved no competition and only one participant.

It must also be conceded that, as generally understood, a game involves a sport or diversion in which two or more persons contest, and we think the meaning of the word "game" in the phrase here under consideration, when taken in connection with the other matters stated in Section 609, means the same.

The section is headed "Tax on Sporting Goods." The articles or instrumentalities there specifically named are sporting goods whether they are used in connection with games or in some recreation or diversion other than a game. But the larger portion of the articles specifically named are all used in games of contest between two or more persons, and the question of construction is whether the articles or instrumentalities intended to be covered by the phrase "games and parts of games" mean articles or instrumentalities used in games of contest like the specific articles previously named in the section, which are used in games of tennis, polo, baseball, etc., all of which involve a contest.

We think this question requires an affirmative answer and that the words "games and parts of games" bring into the list of taxables only such other articles as are used in games of contest, the same as those particularly named are and with which they are closely associated. United States v. Stever, 222 U. S. 167, 174: Casey v. Sterling Cider Co., 294 Fed. 426; Monroe Cider, Vinegar & Fruit Co. v. Riordon, 280 Fed. 624; United States v. Phez Co., 28 Fed. (2d) 106; Hill v. Joseph, 229 Fed. 865; United States v. Florida East Coast R. Co., 222 Fed. 33; United States v. Baumgartner, 259 Fed. 722; 25 R. C. L. 997.

Furthermore the particular article here sought to be taxed is a puzzle. A puzzle is defined as "something which perplexes or embarrasses; a difficult problem or question; hence a toy, contrivance, question or problem designed for testing ingenuity; as a cross word puzzle." Webster's New International Dictionary. A jig saw picture puzzle comes squarely within this definition—"a contrivance . . . designed for testing ingenuity." None of the articles specifically named in the statute and used in games is a contrivance designed for testing ingenuity. They are designed for use in games of contest, while a jig saw puzzle is not.

We recognize that in Baltimore Talking Board Co. v. Miles, 280 Fed. 658, the Ouija Board case, involving Section 900 (5) of the Revenue Act of 1918, which is substantially the same as Section 609 of the Revenue Act of 1932,[1] it was held that an article or instrumentality "not reasonably necessary to comfort according to the average standards of American life" (luxuries) were taxable, if used for "amusement and diversion", on the ground that

[1] The only differences being that the latter act added the phrase "tennis racket frames and strings", omitted the word "cushions" after "canoe paddles", substituted "uniforms" for "goals" after the words "football helmets, harness and", and in the last clause, between the words "commonly" and "commercially" substituted the word "or" for "and."

any article of such a character, if so used, was a game within the meaning of the section. But we think that construction was too broad; that what was meant by the word "games" was restricted to the character of the games previously alluded to in the section, which are all games of contest.

The other articles specifically mentioned in the section and preceding the phrase in question, such as skates, snow shoes, skis, canoe paddles, fishing rods and reels, have no relation to games and afford no means for the ascertainment of the meaning of the phrase "games and parts of games." They are unquestionably sporting goods.

No well settled construction had been placed on Section 900 (5) of the Revenue Act of 1918 (which was repealed by the Revenue Act of 1921), prior to the enactment of Section 609 of the Revenue Act of 1932; for in Mills Novelty Co. v. United States, 50 Fed. (2d) 476, the article or instrumentality there in question was found to be used in a game of contest, in which at least two persons engaged.

Then again a jig saw puzzle was never taxed under Section 900 (5) of the Act of 1918. It was not taxed until after the passage of Section 609 of the Revenue Act of 1932, when the government attempted to tax it as a game. The Act of 1932 became effective June 6, 1932. On August 26, 1932, the Commissioner issued a ruling stating that jig saw or die cut picture puzzles were not taxable. On November 14, 1932, he issued a ruling that they were taxable. On February 7, 1933, he ruled that after February 7, 1933, they were taxable if they contained more than fifty pieces. And on April 20, 1933, he ruled that they were taxable after June 21, 1932, if they contained more than fifty pieces. All of which goes to show that the Internal Revenue Department had little, if any, idea whether a jig saw picture puzzle was an article or instrumentality taxable as a game under the phrase "games and parts of games," particularly when it is said that such a picture puzzle, if it contained more than fifty pieces, was taxable as a game and if it contained fifty pieces or less it was not.

If there is a reasonable doubt as to the meaning of the act, it should be construed most favorably to the taxpayer. *Gould* v. *Gould*, 245 U. S. 151. But we see no reason for resorting to that expedient here.

The judgment of the District Court is vacated and the case is remanded to that court with directions to enter judgment for the plaintiff, with costs in both courts.

On the same day, to wit, January 5, 1937, the following Judgment was entered:

Judgment

January 5, 1937

This cause came on to be heard October 16 and 20, 1936, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, January 5, 1937, here ordered, adjudged, and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that court with directions to enter judgment for the plaintiff, with costs in both courts.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on February 8, 1937, mandate issued.

Clerk's certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages, numbered 1 to 63, inclusive, contain and are a true copy of the record and all proceedings to and including March 26, 1937, in the cause in said court numbered and entitled,

No. 3171

PHILIP J. ARONSON, TRUSTEE, PLAINTIFF, APPELLANT

v.

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, DEFENDANT, APPELLEE

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-sixth day of March, A. D. 1937.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1937

Order allowing certiorari

Filed May 3, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

○

PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. —

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

PHILIP J. ARONSON, TRUSTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Thomas W. White, individually and as former Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above cause on January 5, 1937.

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Massachusetts (R. 10–14) is reported in 13 F. Supp. 913. The opinion of the Circuit Court of Appeals is reported in 87 F. (2d) 272.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 5, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the term "games and parts of games" as used in Section 609 of the Revenue Act of 1932 should be construed as applying only to articles used in games of contest between two or more people.

2. Whether in view of substantial evidence in the record tending to show that jig saw puzzles are adapted to, and widely used in, competitive play, the court below was correct in reversing the trial court's general finding for the petitioner and in directing the entry of a judgment for the respondent.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 609. TAX ON SPORTING GOODS.
>
> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, foot-

ball helmets, harness and uniforms, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods. (U. S. C., Title 26, c. 20B, p. 1186.)

STATEMENT

This is an action at law brought in the District Court for the District of Massachusetts by the respondent herein against the petitioner herein, for the recovery of excise taxes on certain articles, known as jig saw puzzles, manufactured by the respondent, which taxes were assessed and collected under Section 609 of the Revenue Act of 1932 (R. 1–6). Trial by jury was duly waived and the case was tried to the court (R. 7). The court made a general finding for the petitioner, and judgment was entered in his favor (R. 8–10). An appeal from that judgment was taken by the respondent to the Circuit Court of Appeals for the First Circuit, which reversed the judgment of the District Court.

The evidence in the case consisted of oral testimony and certain exhibits offered and received in evidence (R. 15–41, 51–52, 53), including seven

samples of the articles manufactured and sold (R. 25).

The articles in question were all manufactured in the same way; that is, various pictures were selected and backed up with heavier cardboard and then cut by steel dies on a power press (R. 25) into a minimum of 162 pieces and a maximum of 500 pieces (R. 27). In designing and manufacturing the articles, the taxpayer did not limit itself to an appeal to children, but made the articles generally for whoever would buy them (R. 26). In determining the number of pieces into which the pictures were cut, the taxpayer was guided by the requirements of the purchasing public (R. 27). The samples of the articles transmitted to the court below and to this Court as an original exhibit, indicate that what the purchasing public received was a picture backed by thick cardboard that had been cut into pieces in an irregular manner and the pieces mixed up and enclosed in a container (R. 9, Ex. 2). The purchasers of the articles did not receive with the purchase a facsimile of the picture that had been cut up into pieces (R. 9, Ex. 2). The articles suggest to a person seeking pastime or diversion a two-fold effort: first to put the pieces together so as to show a complete picture; second, to show the completed picture in the shortest possible time. During the time covered by the tax assessments, thousands of people from different parts of the country wrote to the taxpayer advising it of the time it took these people to assemble the

pictures (R. 30). During the time the so-called picture puzzle craze was at its height, neighbors and friends met together and assembled these cut pictures (R. 30). The relative time required to put together the cut pictures created competition (R. 31).

The amount sought to be recovered in the action was the sum of $37,021.63, with interest (R. 5–6), and the Circuit Court of Appeals remanded the case to the District Court with directions to enter judgment for respondent with costs in both courts.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the term "games and parts of games" as used in Section 609 of the Revenue Act of 1932 is limited to sports or diversions in which two or more persons contest.

2. In reversing the trial court's general finding for the petitioner, there being substantial evidence in the record to support such finding even under the appellate court's definition of the word "game."

3. In remanding the case with directions to enter judgment for the respondent.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals as to the meaning of the words "games and parts of games" as used in Section 609 of the Revenue Act of 1932 is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit on the

same matter in the case of *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658, certiorari denied, 259 U. S. 587.

In the case of *Baltimore Talking Board Co.* v. *Miles, supra,* the articles taxed were known as ouija boards, being articles made entirely of cardboard and paper. Regarding their purposes and uses, the court stated that the ouija board is seriously used by some persons in the belief that it affords mysterious spirit communication and by others as a means of personal observation of the control of muscular or nervous action, but that it was "largely sold with the expectation that it is to be used merely as a means of social amusement or play, and is actually so used."

The court, in holding the ouija boards to be "games" within the meaning of the revenue statute, stated (p. 661):

> The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries: that is, articles not reasonably necessary to comfort according to the average standards of American life. * * *
>
> On the whole the conclusion seems fair that the present chief purpose of the Ouija board is to supply amusement and diversion, and that it should be held to fall under the comprehensive term "games," within the meaning of the statute.

As shown above, the purposes and uses of the articles in the instant case present the element of contest more than did the ouija boards.

In the instant case, however, the Circuit Court of Appeals in holding that the articles known as jig saw puzzles are not "games" within the meaning of the revenue statute, referred to the case of *Baltimore Talking Board Co.* v. *Miles, supra,* and stated (p. 274):

> We recognize that in *Baltimore Talking Board Co.* v. *Miles* (C. C. A.) 280 F. 658, 661, the Ouija Board Case, involving section 900 (5) of the Revenue Act of 1918 (40 Stat. 1122), which is substantially the same as section 609 of the Revenue Act of 1932,[1] it was held that an article or instrumentality "not reasonably necessary to comfort according to the average standards of American life" (luxuries) were taxable, if used for "amusement and diversion," on the ground that any article of such a character, if so used, was a game within the meaning of the section. But we think that construction was too broad; that what was meant by the word "games" was restricted to the character of the games previously alluded to in the section, which are all games of contest.

[1] The only differences being that the latter Act added the phrase "tennis racket frames and strings", omitted the word "cushions" after "canoe paddles", substituted "uniforms" for "goals" after the words "football helmets, harness and", and in the last clause, between the words "commonly" and "commercially" substituted the word "or" for "and."

CONCLUSION

The construction placed upon the statute by the court below so restricts the operation of the taxing Act that it casts doubt upon the application of the statute. The conflict should be resolved in the interests of efficient administration to the end that the Treasury and the industry may be definitely advised of the scope of the statute. It is therefore respectfully submitted that this petition for writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

APRIL 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 20

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

PHILIP J. ARONSON, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Massachusetts (R. 10–14) is reported in 13 F. Supp. 913. The opinion of the Circuit Court of Appeals (R. 59–62) is reported in 87 F. (2d) 272.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 5, 1937 (R. 63). Petition for writ of certiorari was filed April 3, 1937, and was

granted May 3, 1937 (R. 64). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the term "games and parts of games (except playing cards and children's toys and games)" as used in Section 609 of the Revenue Act of 1932, may be construed to include jigsaw puzzles.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes, regulations, and administrative rulings involved are set forth in the Appendix, *infra,* pp. 25–28.

STATEMENT

This is an action at law brought in the District Court for the District of Massachusetts, by the respondent herein against the petitioner herein, for the recovery of excise taxes on certain articles known as jigsaw puzzles and manufactured by The Viking Manufacturing Company, Inc. The company, of which the respondent is trustee, commenced the manufacture and sale of the articles known as jigsaw puzzles in September or October 1932 (R. 29). Pursuant to the provisions of Section 609 of the Revenue Act of 1932, and the regulations issued thereunder, the company filed with the petitioner, as Collector of Internal Revenue, returns of its gross monthly sales of such articles, covering the period from June 21, 1932, to May 1, 1933. The taxes shown due by the returns as so

filed were duly assessed, and the company paid to the Collector as excise taxes thereon a total sum of $37,021.63 (R. 3–4). The suit in the court below was for the recovery of the taxes so paid (R. 14).

Three issues were raised by the declaration and answer (R. 3–6, 6–7). (1) Were the articles so manufactured and sold games or parts of games within the meaning of Section 609 of the Revenue Act of 1932? (2) Were those articles children's games, and so exempt by the terms of the statute? (3) Were the taxes paid borne by the respondent and not passed on to the ultimate consumer? The last question is no longer involved, as the Collector has acquiesced in the ruling of the District Court that the taxes were in fact borne by the respondent (R. 11, 41).

Trial by a jury was duly waived in writing and the case was tried to the court (R. 6, 7). The evidence in the case consisted of oral testimony and certain exhibits offered and received in evidence (R. 15–41, 51–52, 53), including seven samples of the articles manufactured and sold (R. 25), which have been deposited with this Court as exhibits.

The record shows that the articles taxed were all manufactured in the same way; that is, various pictures were selected and backed up with heavier cardboard and then cut by steel dies on a power press (R. 25) into a minimum of 162 pieces and a maximum of 500 pieces (R. 27). In designing and manufacturing the articles, the company did not

limit itself to an appeal to children, but made the articles generally for whoever would buy them (R. 26). In determining the number of pieces into which the pictures were to be cut, the company was guided by the requirements of the purchasing public (R. 27). The samples of the articles transmitted to the court below and to this Court indicate that what the purchasing public received was a picture backed by thick cardboard that had been cut into pieces in an irregular manner and the pieces disassembled and enclosed in a container (R. 9, Ex. 2; R. 25). The purchasers of the articles did not receive with the purchase a facsimile of the picture that had been cut up into pieces (R. 9, Ex. 2). The articles suggest to a person seeking pastime or diversion a two-fold effort; to put the pieces together so as to show a complete picture, and to show the completed picture in the shortest possible time. During the period covered by the tax assessments, thousands of people from different parts of the country wrote to the company advising it of the time it took them to assemble the pictures (R. 30). At the time the so-called picture puzzle "craze" was at its height, neighbors and friends met together and assembled these cut pictures (R. 30). The relative time required to put together the cut pictures would create competition (R. 31).

After the evidence had been submitted, the Collector moved for judgment and submitted a request for a ruling of law that the Commissioner properly imposed the tax in question (R. 7, 8–9). The tax-

payer moved for judgment and for a special finding of the facts and submitted requests for rulings of law in 19 numbered paragraphs and for findings of fact in 30 numbered paragraphs (R. 8, 9, 42–92). Thereafter the court denied the taxpayer's motion for judgment, to which an exception was taken, and denied also the taxpayer's request for rulings of law and for findings of fact in so far as they were inconsistent with an opinion then announced (R. 9, 49–50). Exceptions were duly taken (R. 49–50). The Collector's request for a ruling of law was granted (R. 9, 49). In its opinion the court held that jigsaw puzzles were within the dictionary definition of the word "game", and that in view of the comprehensive scheme of taxation of which the tax was a part, the Commissioner's construction of the term was proper. The court further held that the puzzles taxed did not come within the statutory exception as children's games (R. 10–14). Thereafter judgment was entered in favor of the Collector (R. 10) and the respondent appealed. The Circuit Court of Appeals reversed the judgment of the District Court, holding that jigsaw puzzles cannot be regarded as games within the meaning of the statute, because the statutory term should be limited to games of contest (R. 59–62).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the term "games and parts of games", as used in Section 609 of the Revenue Act

of 1932, is limited to sports or diversions in which two or more persons contest.

2. In reversing the trial court's general finding for the petitioner, there being substantial evidence in the record to support such finding even under the appellate court's definition of the word "game."

3. In remanding the case with directions to enter judgment for the respondent.

SUMMARY OF ARGUMENT

The phrase "games and parts of games (except playing cards and children's toys and games)" in Section 609 of the Revenue Act of 1932 was properly construed by the Commissioner and the District Court to include jig-saw puzzles. Words even in Revenue Acts are presumed to be used in their ordinary and usual sense. The dictionary definitions and popular meaning of the term "games" are sufficiently broad to cover articles of amusement whether or not used in competition between two or more persons, particularly where, as here, they involve a trial of skill and resolution and what is popularly felt to be a contest against the ingenuity of the maker and against the passage of time. A narrow construction of the term "games" was rejected in the only other two cases raising the question. See *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658 (C. C. A. 4th), certiorari denied, 259 U. S. 587, holding an ouija board taxable as a game, and *Mills Novelty Co.* v. *United States,* 50 F. (2d) 476 (C. Cls.), certiorari denied,

285 U. S. 547, holding a so-called slot machine taxable as a game. The view of the court below in the present case would exclude solitaire from the class of games, though it is universally so classified and regarded.

The provision in question is part of a comprehensive revenue measure laying an excise on luxuries. Its scope is therefore not to be restricted by technical refinements. Cf. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488.

The taxpayer's position is not aided by rules of statutory construction. The rule of *ejusdem generis* has no application, since the term in question is specific and the preceding enumeration of games is relatively slight. If the rule of *noscitur a sociis* be applied, a narrow construction is not required, for the articles enumerated include articles used by one person alone and non-competitively, such as canoe paddles, snowshoes, and fishing rods. Moreover, the express exception of toys from the category of games indicates the generality of the latter term. Commercial meaning has not been definitely shown, and in any event was not intended to be the touchstone of the scope of the provision, since with reference to sporting goods the same section of the statute provides for the inclusion of articles "commonly or commercially known" as such.

The puzzles here taxed, comprising from 162 to 500 pieces each, cannot be regarded as children's games within the statute. The ruling of the Com-

missioner classifying jig-saw puzzles of 50 pieces or less as children's games is not arbitrary and unconstitutional. Jig-saw puzzles of fewer pieces than those here involved are said by manufacturers and importers to be designed for adults and hence not subject to duty as toys under the Tariff Act. *John Wanamaker* v. *United States,* T. D. 43674 (Ct. Cust. & Pat. App.).

ARGUMENT

The tax imposed upon the respondent in respect of the jigsaw puzzles manufactured by it was assessed under Section 609 of the Revenue Act of 1932, *infra,* p. 25, which imposes a tax of 10 per cent of the sales price upon various enumerated articles, including "games and parts of games (except playing cards and children's toys and games)". The term "game" as used in the Act is defined in Regulations 46, Article 53, promulgated thereunder:

> The term "game" includes games of skill or chance and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax.

Article 55 provides:

> Among the articles subject to tax as games are dice, chess and checker sets, ping-pong sets, roulette wheels, backgammon sets, etc.

The taxability of a jigsaw puzzle as a game has been the subject of specific consideration by the Treasury Department. The authoritative published rulings of the Department hold that such an article is properly taxed as a game, except that a jigsaw puzzle which contains fifty pieces or less is a children's game, and so specifically exempt under the statute. S. T. 567, XI–2 Cumulative Bulletin 481, *infra*, p. 27. The foregoing ruling was adhered to on further consideration in S. T. 675, XII–1 Cumulative Bulletin 403, *infra*, p. 28. These ruling were published on November 14, 1932, and May 29, 1933, respectively. It is true that at an earlier date, August 26, 1932, a manufacturer of puzzles was advised by the Deputy Commissioner that jigsaw and picture puzzles were not taxable under Section 609 of the Revenue Act of 1932 (R. 20). That advice, however, was withdrawn in a subsequent letter from the Commissioner under date of February 7, 1933, and again on April 20, 1933 (R. 39–40, 40–41).[1]

[1] Respondent makes an argument (Br. in opp., pp. 12–13) based on the substantial reenactment of the provisions of the 1917 and 1918 Acts in the 1932 Act as constituting approval of the administrative construction of the earlier Acts. The principle, however, has no application here. The statement of respondent (Br. in opp., p. 13) that under the earlier Acts jigsaw puzzles were manufactured and sold without being subject to the tax is founded solely upon an assertion of taxpayer's counsel in the course of a colloquy at the trial (R. 19). The fact seems to be that no rulings were made on the point by the Commissioner, and apparently none was requested by manufacturers. It does not

The Circuit Court of Appeals, in holding the Commissioner's definitive rulings to be improper, was of opinion that the term "games" as used in the statute must be limited to articles used in contests between two or more persons. The rejection of the Commissioner's construction and the substitution of this restricted meaning was, we submit, erroneous.

1. Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them. *DeGanay* v. *Lederer*, 250 U. S. 376, 381. As the case cited indicates, the rule is applicable to revenue measures as well as to non-revenue measures. The ordinary meaning of the term "games" is not limited to contests between two or more persons. A familiar broader definition is contained in the standard dictionaries. Thus, Webster's New International Dictionary defines "game" as "sport of any kind; play, frolic, or fun" and as "an amusement or diversion." The New Standard Dictionary (Funk & Wagnalls) defines "game" as "any exercise for diversion or

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even appear that jigsaw puzzles manufactured in the earlier years were of a size designed for the use of adults, or that they were manufactured in any appreciable quantity. As the question was not the subject of consideration by the Treasury Department, it cannot be said that Congress in 1932 adopted a prior administrative construction. In fact, the taxation of ouija boards and slot machines under the 1918 Act (*infra*, p. 12) indicates a prior administrative construction of the term "games" opposed to respondent's contention.

amusement; a play." The Century Dictionary and Cyclopedia defines "game" as "mirth; amusement; play; sport of any kind" and as "a play or sport for amusement or diversion." It is true that a more restricted definition of the term is contained also in these works of reference. In its more restricted meaning the word "game" is defined by Webster's New International Dictionary as "a contest, physical or mental, conducted according to set rules, and undertaken for amusement or recreation, or for winning a stake"; by the New Standard Dictionary as "a contest for recreation or amusement, to be won by chance, skill, or endurance, or by any or all combined"; and by the Century Dictionary as "a contest for success or superiority in a trial of chance, skill, or endurance, or of any two or all three of these combined."

As will appear more fully below, no persuasive reason appears why the term should be taken in its more restricted meaning here. A similar question was before this Court in *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, involving the comparable and cognate manufacturer's excise tax on "candy." In holding that sweet milk chocolate was embraced within the statutory term, this Court observed (p. 491) that the word "candy", "as the dictionary suggests, may be used in this narrower and more restricted sense. But it may be, and we think is used, as the dictionary also suggests, in a popular and more general sense * * *."

While no case involving the tax on games has come before this Court, the two decisions in the

lower courts which have construed the provision have adopted and approved the administrative interpretation. *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658 (C. C. A. 4th), certiorari denied, 259 U. S. 587; *Mills Novelty Co.* v. *United States,* 50 F. (2d) 476 (C. Cls.), certiorari denied, 285 U. S. 547. In the former case the court held that ouija boards were subject to tax as games, and in the latter case the court held that certain so-called slot machines which were operated in an endeavor to win a stake were taxable under the statute. The court there said (p. 477): "The word 'game' is very comprehensive, and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement."[2] Neither of the articles thus held to be taxable as games was designed to be used by two or more persons in competition. The ouija board, while operated by two persons, did not involve an ele-

[2] This definition was quoted from the opinion of Judge Cooley in *People* v. *Weithoff*, 51 Mich. 203, 214, a criminal case. We do not mean to suggest that the construction of criminal statutes directed against gaming or the carrying on of games is helpful to a decision here. The purpose and policy reflected in such laws furnish distinct guides to construction. In the court below, for example, respondent relied upon Oehley v. Rex (1908), E. D. C. 38 (Cape of Good Hope). That case held that in the Cape of Good Hope, where an ordinance existed forbidding the playing of games on Sunday, golf might be played with impunity where the players "carefully and apparently deliberately avoided playing together, and proceeded round the course alone." Otherwise the law "would lead to a very far-reaching and intolerable interference with the liberty of the public." The remoteness of the case is, we think, evident.

ment of competition. The slot machine, which was operated by only one person, involved no element of competition save in the sense that the operator was competing for success against the absent owner of the machine. The same element is present in the use of jigsaw puzzles, or of any puzzles; since the user tests his ingenuity and patience against the skill of the manufacturer in an endeavor to attain the object of the puzzle successfully and in the shortest possible time.

What has just been said indicates why jigsaw puzzles are naturally regarded as games even though the concept of games be limited to contests played according to rules and with the object of achieving success or victory through chance, skill, or endurance or a combination of these. The use of jigsaw puzzles, as an examination of the exhibits in this Court will show, involves these elements. The articles are designed to be used according to rules; namely, that the pieces must be accurately fitted together, that all must be used, that a completed picture must finally be disclosed, and, in the case of the exhibits before this Court, that the identity of the completed picture be not revealed to the player in advance. The relative simplicity of the rules should not obscure their existence. The use of jigsaw puzzles, moreover, tests quickness and accuracy of perception, together with patience. Such a trial of skill and resolution is popularly thought of as a contest against the ingenuity of one who devised the test and against the passage

of time, just as a game of chance is popularly thought of as a contest against odds. If the trial is undertaken for sport, amusement, or recreation, as is concededly true in respect of jigsaw puzzles, it is naturally and properly thought of as a game. Whether one player or more than one player actively participates is unimportant. We submit that the Commissioner, no less than manufacturers of games, was entitled to take account of these popular modes of thought and action.[3]

The view of the Circuit Court of Appeals would eliminate from the class of games what is commonly known as the "game" of solitaire. "Solitaire" is defined, for example, by Webster as "a game which one person can play alone, applied to many games of cards, etc.; also, to a game played on a board with pegs or balls, in which the object is, beginning with all the places filled except one, to remove all but one of the pieces by 'jumping', as in checkers." In standard works on games, a discussion of solitaire (or patience, as it is sometimes called) is commonly included. See, e. g., *Hoyle's Games* (Foster ed., 1934), pp. 264–265, 400. Indeed, entire books have been written about the "game" of solitaire. *E. g.*, Bergholt, *Handbook to Game of Solitaire;* Bonaventure, *Games of Soli-*

[3] It is to be noted, moreover, that the puzzles are patently adapted for use even in competition between two or more persons, playing successively and comparing the number of minutes required (cf. R. 30, 31), just as in the game of golf competition is based on a count of each player's strokes.

taire; Dick, *Dick's Games of Patience;* Kearney, *Fifty Games of Solitaire;* Polk, *Thirty Games of Solitaire.*

2. The origin, history, and purpose of the taxing provision in question indicate that the court below unduly restricted its scope.

The provision taxing games first appeared in Title VI, Section 600 of the Revenue Act of 1917, which levied so-called war excise taxes. That section imposed an excise tax at various rates upon automobiles, phonographs, moving picture films, jewelry, perfumes and cosmetics, medicinal preparations, chewing gum, and cameras, and in paragraph (f) upon—

> tennis rackets, golf clubs, baseball bats, lacrosse sticks, balls of all kinds, including baseballs, foot balls, tennis, golf, lacrosse, billard and pool balls, fishing rods and reels, billard and pool tables, chess and checker boards and pieces, dice, games and parts of games, except playing cards and children's toys and games, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold * * *.

The Revenue Act of 1918, Title IX, Section 900, contained a similar schedule of articles subject to excise taxes, listed in twenty-one paragraphs. Paragraph 5 was similar to paragraph (f) just quoted from the 1917 Act, except that certain additional articles were enumerated. The tax on "games and

parts of games (except playing cards and children's toys and games)" was retained. The Committee Reports on the 1918 Act make plain the intention of Congress to tax a wide variety of articles which are generally regarded in their nature as luxuries. The Senate Report (No. 617, 65th Cong., 3d Sess.), p. 53, and the House Report (No. 767, 65th Cong., 2d Sess.), p. 33, contain the following identical language:

> In recommending excise taxes in the proposed bill your committee has endeavored to select articles that fall within two classes: (1) Articles that are more or less a luxury because of their nature and (2) articles that become in the nature of a luxury when sold for more than a fixed price. The purpose of the committee in recommending these taxes is twofold: (1) To provide revenue and (2) to reduce extravagance.

The war excise taxes provided in the 1917 and 1918 Acts were repealed in the Revenue Act of 1921, Section 1400 (a). But in 1932, when the need for additional sources of revenue once more became acute, Congress again resorted to a manufacturers' excise tax on luxuries. The bill which became the Revenue Act of 1932 contained, in its original form in the House, a provision for a general manufacturers' excise, or sales tax, with limited exemptions, principally of foods (75 Cong. Rec. 6684). This plan, however, proved unacceptable, and after protracted debate an excise tax on selected articles was

adopted as a substitute (75 Cong. Rec. 6798–6808, 6816, 7034–7042, 7131–7134). Among the articles taxed in the 1932 Act which had been taxed in the 1918 Act are (disregarding differences in description): tires and inner tubes, toilet preparations, furs, jewelry, automobiles, sporting goods, firearms, shells and cartridges (except those sold for governmental use), cameras, candy, chewing gum.

The inclusion of the tax on games as part of a comprehensive measure to raise revenue through the taxation of luxuries was stressed in the *Baltimore Talking Board* case, *supra,* as persuasive evidence of the comprehensive scope of the tax. The court there said (280 Fed. at 661):

> The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries: that is, articles not reasonably necessary to comfort according to the average standards of American life.

Likewise this Court in the *Hershey Chocolate Co.* case, *supra,* emphasized the character of the tax as one on luxuries and viewed the particular provision in question in that setting. "If it were necessary to our decision," the Court said (283 U. S. at 491), "in the absence of any controlling legislative history or any suggested plausible reason why a tax on candy, in a general revenue measure taxing luxuries, should be deemed to apply to one type of confectionery and not to the other, we should hesi-

tate to say that the word was used in its restricted sense * * *." So here, no plausible reason is advanced for imputing to Congress an intent to tax as a luxury articles, such as chess sets, used for amusement in a test of skill and engaged in according to rules by two or more persons, and to leave untaxed articles, such as jigsaw puzzles, used also for amusement in a test of skill engaged in according to rules, but by one person. Congress has employed a term, "games", ample in meaning to include both. We submit that the Commissioner did not err in giving to the term that meaning. "The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements." *Raybestos-Manhattan Co.* v. *United States,* 296 U. S. 60, 63.

3. Certain rules of statutory construction are invoked by respondent in support of the decision below.

The first of these is the rule of *ejusdem generis* (Br. in opp., p. 11), which is thought to limit the term "games and parts of games" to those games which, like the ones previously enumerated, involve an element of competition between two or more persons. But the phrase in question is not "other games", but "games", and the preceding enumeration is relatively slight. Moreover, among the articles specifically taxed in the same series with the enumerated games are skates, snowshoes, skis, toboggans, canoe paddles, and fishing rods and reels,

none of which is designed necessarily for competitive sport. Hence the phrase "all similar articles commonly or commercially known as sporting goods", which is not here involved, but which might more properly be construed according to the rule of *ejusdem generis,* is clearly meant to include articles of sport whether designed for competitive play or not. It would be an unwarranted use of the rule of *ejusdem generis* to apply it to the term "games and parts of games", where it has no proper bearing, to reach an opposite result. Cf. *Texas* v. *United States,* 292 U. S. 522, 534.

Respondent relies, in the second place, upon the rule of *noscitur a sociis* (Br. in opp., p. 11). It is true that words may be known by the company they keep; but here the company is most catholic. The articles enumerated in Section 609 include articles used for physical and for mental recreation, articles used competitively and non-competitively, articles used by one person and by more than one person. Hence even if the rule could properly be applied here, where it would seem rather to create than to solve an ambiguity (cf. *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, 519), its application does not in any event aid respondent's case. Furthermore, the argument of respondent overlooks the force of the words of exception following "games and parts of games", namely, "except playing cards and children's toys and games." The mention of toys indicates that

but for the express exception they would be included in the term "games." *Helvering* v. *Stockholms &c. Bank,* 293 U. S. 84, 94; *Gooch* v. *United States,* 297 U. S. 124, 129. As the word "toys" is not limited to those used by two or more children in competition, the conclusion is fortified that the word "games" is not to be so limited.

Respondent argues also that the terms of the statute should be read in their commercial sense, and that "games" has a special and limited meaning commercially. It may well be doubted whether the testimony adduced by respondent showed a general, uniform, and well-defined trade meaning, as opposed to personal definition. (R. 15, 23, 24, 25, 29, 35, cited in Br. in Opp., p. 9.) But the short answer to the argument is that the statute itself contains a caution against confining its terms by commercial meaning. The concluding phrase is "all similar articles commonly *or* commercially known as sporting goods" [italics supplied].[4] It is not to be supposed that a more restrictive criterion is to be applied with respect to "games." Moreover, it appears that in the Tariff Acts, where the rule of commercial meaning has its chief application, no distinct classification is made of puzzles and games as such. On the contrary, jigsaw puzzles, like other games which are not spe-

[4] The court below, it may be observed, erroneously stated that in the 1918 Act the word "and" had been used. (R. 61, note.) The word "or" appears in both the 1918 and the 1932 Acts.

cially named, are classified as toys if designed for children, and otherwise according to their component material of chief value. *United States* v. *Louis Wolf & Co.*, T. D. 43719 (Ct. Cust. and Pat. App.); *John Wanamaker* v. *United States*, T. D. 43674 (*id.*). The propriety of according the word its common meaning here is thus clearer than it was in the *Hershey Chocolate Co.* case, *supra*, where it appeared that for over a hundred years the Tariff Acts had separately classified "sugar candy" and "chocolate."

Respondent's final reliance is on the doctrine that taxing statutes are to be construed strictly. It is enough to say, as this Court has many times observed, that "The rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent." *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 94, and cases cited.

4. A question remains concerning the determination of the Commissioner that the puzzles manufactured by the taxpayer were not children's games and so exempt under the terms of the statute. The Commissioner has ruled (S. T. 567, *infra*, p. 27) that for revenue purposes a jigsaw puzzle containing 50 pieces or less is regarded as a children's game. The ruling is based on the fact that a small

puzzle "may properly be considered as one so simple as to warrant classification as a children's game", whereas "Where such puzzles contain many pieces they become more complex and are taxable on the ground that they are designed for use by adults" (*ibid.*). The ruling has been assailed by respondent on the ground that it is "arbitrary and unreasonable and constitutes an improper and discriminatory classification in violation of the Fifth Amendment to the Constitution of the United States" (R. 43–44).

The issue in the present case does not concern the validity of the Commissioner's ruling in general, for the puzzles manufactured by the taxpayer contain from 162 to 500 pieces (R. 27). The number of puzzles in each size group does not appear. The precise nature of the respondent's objection to the classification is not altogether clear. It is apparently not denied that in any classification required by the statute the number of pieces in a puzzle is a material factor to be considered. The objection seems to be that other factors, such as the shape and coloring of the pieces, affect the difficulty of solving the puzzle, and hence bear upon their use by children or adults (R. 36). No practical method has been suggested by which the Commissioner, in his endeavor to comply with the mandate of the statute, could take account of all possible factors bearing upon the use of these puzzles.

Neither the statute nor the Constitution requires administrative action so impractical as to be impossible.

If, then, the criterion of the number of pieces is accepted as a proper basis for classification, there is no reason to regard the action of the Commissioner as arbitrary in its application to the articles taxed in the present case. On the contrary, prior to the enactment of the 1932 Act there had been expert testimony and an authoritative ruling under the Tariff Act which support the classification here. *John Wanamaker* v. *United States*, T. D. 43674 (Ct. Cust. & Pat. App., 1929). The court there held that puzzles which contained about 250 pieces were not to be classified as toys, and the court relied heavily in that connection upon the testimony of Mr. George S. Parker, a designer and manufacturer of toys and games, appearing on behalf of the importer, who "testified that jigsaw puzzles that run 100 pieces or more are designed for adults."[5] In this view, we submit, the Commissioner's classification cannot be regarded as an inadmissible one under the Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the determination of the Commissioner

[5] The same witness appeared for the respondent in the present case. His testimony on the question here discussed appears at R. 16, 18.

was correct, and that the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

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OCTOBER 1937.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 609. TAX ON SPORTING GOODS.
>
> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basket ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods.

Treasury Regulations 46, promulgated under the Revenue Act of 1932:

> ART. 53. *Scope of Tax.*—The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well as to all similar articles commonly or commercially known as sporting goods, games, and parts of games (except playing cards and children's toys and games).
>
> The term "sporting goods" includes all articles of the same general character as

those specifically named, the purpose of which is primarily for use either indoors or outdoors in connection with a game or sport.

The term "game" includes games of skill or chance and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax.

ART. 55. *Games.*—Among the articles subject to tax as games are dice, chess and checker sets, ping-pong sets, roulette wheels, backgammon sets, etc.

Parts of games are subject to the tax in the same manner as games.

ART. 56. *Articles not subject to tax.*—Gymnasium and playground equipment, including rowing machines, trapeze rings, punching bags, dumbbells, Indian clubs, parallel bars, and similar articles, are not subject to tax as sporting goods or games.

There are other articles used in sports or games which by reason of their general use for other purposes are not subject to the tax unless sold as a part of a uniform. Among such articles are bathing suits, sweaters, trunks, athletic underwear, plain rubber-soled shoes, hose, belts, and similar articles.

The Act specifically provides that the tax shall not attach in the case of children's toys and children's games.

Ordinary playing cards subject to the stamp tax imposed by Title VIII of the Revenue Act of 1926 are not subject to tax as games, but the tax will attach in the case of other card games.

XI-2 Cumulative Bulletin 481:

REGULATIONS 46, ARTICLE 55: Games. XI-46-5856 S. T. 567

Taxability of jigsaw puzzle as a game.

Advice is requested concerning the taxability, under section 609 of the Revenue Act of 1932, of jig saw puzzles as games.

The word "games", as used in section 609 of the Revenue Act of 1932, does not mean the games themselves but the instrumentalities used in playing them. (See *Baltimore Talking Board Co.* v. *Miles*, 280 Fed., 658, T. D. 3401, C. B. I-2, 297.) Under the strict interpretation of that word all picture puzzles could be classified as games and held to be taxable. However, children's games are specifically exempted from the tax. It would follow that if the picture puzzles, or games, are of the type ordinarily designed for the use of children, they are not taxable.

A jig saw puzzle containing comparatively few pieces may properly be considered as one so simple as to warrant classification as a children's game and exempt from the tax. Where such puzzles contain many pieces they become more complex and are taxable on the ground that they are designed for use by adults. For revenue purposes, it is held that if the jig saw puzzle contains 50 pieces or less, it is a children's game and not subject to the tax. If the jig saw puzzle contains more than 50 pieces it is subject to the tax as a game under section 609 of the Revenue Act of 1932.

XII–1 Cumulative Bulletin 403:

REGULATIONS 46, ARTICLE 55: Games. XII–22–6204
S. T. 675

Jigsaw and die-cut picture puzzles
(S. T. 567 affirmed)

An opinion is requested concerning the propriety of a previous ruling (S. T. 567, C. B. XI–2, 481) relative to the taxability of jigsaw and die-cut picture puzzles under section 609 of the Revenue Act of 1932.

The ruling has been further considered and the Bureau has reached the conclusion that it embodies a proper interpretation of the law. Accordingly, the ruling (S. T. 567) holding that jigsaw or die-cut picture puzzles containing more than 50 pieces are games and that sales of such games by the manufacturers, producers, or importers thereof are subject to tax under section 609 of the Revenue Act of 1932, is affirmed. Jigsaw or die-cut picture puzzles which contain 50 pieces or less will be regarded as children's games and, therefore, exempt from the tax imposed under section 609 of the Revenue Act of 1932. Manufacturers should file returns and pay the tax on the basis indicated.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 853.

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER,

v.

PHILIP J. ARONSON, TRUSTEE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Massachusetts (R. 10) is reported in 13 F. Supp. 913. The opinion of the Circuit Court of Appeals for the First Circuit (R. 59) is reported in 87 F. (2d) 272.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 5, 1937. The petition for a writ of certiorari was filed on April 3, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The sole question presented on the record in the case at bar is whether the Circuit Court of Appeals erred in holding that the particular articles manufactured and sold by the Viking Manufacturing Company, Inc., namely, jig saw picture puzzles, were not taxable as "games and parts of games" under Section 609 of the Revenue Act of 1932.

STATUTE AND REGULATIONS INVOLVED.

Revenue Act of 1932, c. 209, 47 Stat. 169:

> "SEC. 609. TAX ON SPORTING GOODS.
>
> "There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, *chess and checker boards and pieces, dice, games and parts of games* (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods." (U. S. C., Title 26, c. 20B, p. 1186.) (Italics ours.)

Regulations 46 relating to excise taxes on sales by the manufacturer under Sections 602–611, inclusive, 613 and 614 of the Revenue Act of 1932, promulgated

by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury on June 18, 1932, contained the following provisions with respect to this tax:

"ART. 53. SCOPE OF TAX.—The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well as to *all similar articles commonly or commercially known as* sporting goods, *games, and parts of games* (except playing cards and children's toys and games). (Italics ours.)

. . . . . .

"The term 'game' includes games of skill or chance and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax.

"ART. 55. GAMES.—Among the articles subject to tax as games are dice, chess and checker sets, pingpong sets, roulette wheels, backgammon sets, etc.

. . . . . .

"ART. 56. ARTICLES NOT SUBJECT TO TAX.—Gymnasium and playground equipment, including rowing machines, trapeze rings, punching bags, dumbbells, Indian clubs, parallel bars and similar articles, are not subject to tax as sporting goods or "games."

. . . . . .

STATEMENT.

Supplementing the statement of the petitioner, the following facts should be called to the attention of the Court:

Jig saw puzzles and picture puzzles of the jig saw type have been manufactured since the early part of the Nineteenth Century and perhaps as early as the American Revolution (R. 16). The unanimous opinion of experts and of manufacturers and distributors of both games and jig saw puzzles is to the effect that a jig saw puzzle or picture puzzle of the jig saw type is not a game (R. 15, 23, 25, 29, 35). In the terminology of the trade a jig saw puzzle is not a game (R. 15, 23). The word "game", in its trade signification, means articles or instrumentalities employed in a contest between two or more persons according to a set of rules, where there is competition, an uncertain outcome and a winner and loser (R. 16, 23, 25, 31, 35). It appears that this is the sense in which the word was used in Article 55 of Regulations 46 (p. 3, *supra*) since all of the articles therein named are obviously designed for use in such a contest. There are no rules, however, for the solution of a jig saw puzzle (R. 16, 26). The word "game", in the terminology of the trade, never includes either puzzles or toys, all three constituting separate and distinct types or categories of amusement devices (R. 15, 24).

Children are at least as adept as adults in solving jig saw puzzles and sometimes they are rather smarter than their parents in doing them (R. 16, 26, 36). Children can solve picture puzzles in excess of 50 pieces (R. 16, 26) and the puzzles manufactured by the Viking Manufacturing Company, Inc., were as readily soluble

by children as by adults. Even the 162 piece puzzle was too easy for children (R. 27, 30).

From February 25, 1919, to December 31, 1921, jig saw and picture puzzles were manufactured and sold without being subject to tax as games under the provisions of Section 900 (5) of the Revenue Act of 1918 (R. 19). On August 26, 1932, the Commissioner made an unpublished ruling that jig saw puzzles were not subject to tax under Section 609 of the Revenue Act of 1932 (R. 20). This ruling was reversed on February 7, 1933, the ruling being given prospective operation only (Deft's Ex. A, R. 39). On April 20, 1933, the ruling of February 7 was again reversed in part, the tax being given retroactive effect to puzzles made on or after June 21, 1932 (Deft's Ex. B, R. 40). No tax was assessed or collected with respect to sales of jig saw or picture puzzles prior to the ruling of the Bureau of Internal Revenue in S. T. 567, published on November 14, 1932 (R. 19, 41).

ARGUMENT.

I. THE DECISION IN THE INSTANT CASE DOES NOT CONFLICT WITH THE DECISION IN BALTIMORE TALKING BOARD CO. v. MILES, 280 FED. 658, CERTIORARI DENIED, 259 U. S. 587.

The actual decision in the case at bar is that the *jig saw picture puzzles* in question are not included within the phrase "games and parts of games" as used in Section 609 of the Revenue Act of 1932. In the case of *Baltimore Talking Board Co.* v. *Miles, supra,* it was held that the articles there in question, known as *ouija boards,* were taxable as games under Section 900 (5) of the Revenue Act of 1918.

It is submitted that a comparison of the facts involved in the ouija board case, so called, with those in the case at bar establishes beyond a doubt that the two articles are entirely different and that the decisions in both cases are in complete harmony.

In that case the decision that a ouija board was taxable as a game was clearly based upon the fact that the taxpayer had obtained a patent which described the article as follows (p. 660):

> "The object of the invention is to produce *a game with which two or more persons can amuse themselves* by asking questions and having them answered by the device used and operated by the touch of the hand, so that the answers are designated by the letters of the alphabet." (Italics ours.)

In that case, moreover, the defendant introduced into evidence certain envelopes, boxes and boards which contained printed directions for operating the board.

The basis of the decision in that case is disclosed in the following language of the Court (pp. 661, 662):

> "In view of the comprehensive scope of the Revenue Act, the common knowledge that the ouija board is so generally used as a means of amusement, *the fact that the Patent Office issued a patent describing it as a game,* the presumption that the revenue officers correctly found *it was so used* after investigation, *and the absence of any testimony to the contrary,* we think the finding of the District Judge had adequate support in the testimony and therefore cannot be reversed by this Court." (Italics ours.)

No extended argument is necessary to show the complete absence of similarity between the ouija board and the jig saw picture puzzles here in controversy. In that case the taxpayer had obtained a patent which described the article as a game. The article in the case at bar, however, was not so patented. There the article was accompanied with printed directions for its operation. In the instant case the uncontradicted testimony in the record discloses that there are no rules for the solution of a jig saw picture puzzle (R. 16, 26). There the record disclosed no testimony that the article was not a game. In the case at bar the overwhelming and undisputed testimony establishes the fact that a jig saw puzzle or picture puzzle of the jig saw type is not a game. As the Circuit Court of Appeals pointed out in its opinion (R. 61) the particular article here sought to be taxed is a puzzle, which is defined as "a contrivance designed for testing ingenuity". Obviously the ouija board is not such a contrivance and therefore bears no similarity to the article in controversy.

The question whether an article is or is not subject to tax under the particular statute involved is always a question of identification. *Philadelphia Storage Battery Co.* v. *Lederer,* 21 F. (2d) 320, 321, 322. As the Court said in that case (p. 322):

> ". . . the test is whether the 'article' attempted to be taxed is the 'article' upon which the tax has been imposed by law."

It is accordingly submitted that there is no conflict of decisions.

II. THE REASONING OF THE COURT IN BALTIMORE TALKING BOARD CO. v. MILES, SUPRA, DOES NOT CONFLICT WITH THE REASONING OF THE COURT IN THE CASE AT BAR.

Not only is there no conflict of decisions in the instant case, but it is submitted that even the reasoning in the opinions of the two Courts is reconcilable when the language of the Court in the ouija board case is properly analyzed.

It is true that the Court said in that case (p. 661):

> "The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries; that is, articles not reasonably necessary to comfort according to the average standards of American life . . ."

This statement of the Court, however, did not have specific reference to the phrase "games and parts of games" in Section 900 (5) of the 1918 Act, but was directed to Section 900 in its entirety. This section, in addition to sporting goods and games, imposed a tax upon a wide variety of luxuries named in its twenty-one subdivisions, including such articles as automobiles, automobile parts and accessories, musical instruments, chewing gum, candy, films, firearms, hunting knives and garments, electric fans, thermos bottles, smoker's articles, slot machines, liveries, fur goods, pleasure boats and toilet soaps. Unquestionably none of these articles may be called a necessity. It seems obvious that the Court could not have meant that *all* luxuries were taxable under the statute since

it expressly stated that the intention was disclosed to tax sales of *"all articles which were thought of and named"*. It is therefore submitted that the above quoted language does not and was not intended to define the scope of the phrase "games and part of games" and that accordingly there is not even a conflict or difference in the reasoning of the two cases.

Even assuming, however, that there is such a conflict in reasoning, which the respondent contends does not exist, it is respectfully submitted that a conflict or difference in reasoning is not a conflict of decisions so as to warrant the granting of the petition in the case at bar.

III. THE DECISION OF THE COURT IN THE CASE AT BAR IS CORRECT.

Notwithstanding the general finding of the trial Court for the petitioner, the record presented to the Circuit Court of Appeals the question whether, as a matter of statutory construction, the phrase "games and parts of games" in Section 609 of the Revenue Act of 1932 included within its scope the articles in question. The construction adopted by the Circuit Court of Appeals is fully warranted on the facts disclosed by the record and the authorities applicable thereto.

1. In its commercial or trade usage a "puzzle" is not a "game". There was ample testimony in this case, which was not contradicted, that in the terminology of the trade a jig saw picture puzzle is not a game (R. 15, 23, 24, 25, 29, 35). There is abundant authority for the view that the words in question were used in the sense in which they were understood in the trade.

Philadelphia Storage Battery Co. v. *Lederer,* 21 F. (2d) 320, 321.

Nix v. *Hedden,* 149 U. S. 304, 13 S. Ct. 881, 37 L. Ed. 745.

Monroe Cider, Vinegar & Fruit Co. v. *Riordan,* 280 Fed. 624, 629.

This rule was admirably stated in the *Philadelphia Storage Battery Co. case, supra,* as follows (p. 321):

> "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them. The command here is directed to 'manufacturers, producers and importers' of the 'articles' named. It is, because of this, a fair inference that Congress spoke to them in their own language. This means that the phrases of the law are to be given the meaning they have in the trades concerned.
>
> "This brings it pretty close to a question of trade nomenclature or terminology."

This rule seems to have been followed by the Commissioner himself when he said in Article 53 of Regulations 46 (p. 3, *supra*):

> "The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well as to *all similar articles commonly or commercially known as . . . games, and parts of games . . .*"

2. Apart from the question of commercial or trade usage, there are organic differences between "games" and "puzzles". These inherent differences are recognized in the dictionary definitions of the two words, which establish the fact that in its common and ordinary meaning a puzzle is not a game.

3. The decision of the Circuit Court of Appeals in the instant case is based in part upon the application of the well known doctrines *ejusdem generis* and *noscitur a sociis* which have been invoked in many decisions of this Court and other courts.

> *United States* v. *Nichols,* 186 U. S. 298, 300.
> *United States* v. *Baumgartner,* 259 Fed. 722.
> *Phez Co.* v. *United States,* 25 F. (2d) 1011, aff'd., *United States* v. *Phez Co.,* 28 F. (2d) 106.

The enumeration of articles taxable as games, in Article 55 of Regulations 46 (p. 3, *supra*), to wit:

> "ART. 55. GAMES.—Among the articles subject to tax as games are dice, chess and checker sets, pingpong sets, roulette wheels, backgammon sets, *etc.*",

is concrete evidence of the application of these doctrines by the Commissioner himself in defining the scope of the word "games". The abbreviation "etc." means, of course, "and others of the like kind" and is generally used when a number of individuals of a class have been specified, to indicate that more of the same sort might have been mentioned but for shortness are omitted.

4. The correctness of the decision in the case at bar is further borne out by the legislative history of the tax on "games and parts of games" as disclosed in the Congressional Committee Reports under the Revenue Acts of 1917, 1918 and 1932, which clearly reveal an intention to impose a tax upon such sporting goods and games as were specifically mentioned and those of *like character.* To illustrate, it is enough to refer

to the Report of the Senate Committee on Finance in connection with H. R. 4280, which became the Revenue Act of 1917 (Report No. 103, 65th Congress, 1st Session, Vol. I, Miscellaneous, No. 7249), which states, at page 11:

"TITLE VI. WAR EXCISE TAXES.

"Your committee felt certain that articles used in *certain amusement games,* such as tennis rackets, billiard and pool balls, billiard and pool tables, checker and chess boards, dice, etc., should bear a moderate tax of this character, and acting upon this principle has retained the gross-sales tax imposed by the House bill *upon these and certain like articles* . . ." (Italics ours.)

5. Assuming that there is any doubt as to the applicability of Section 609 of the 1932 Act to the articles in question, the failure of the Commissioner of Internal Revenue to tax jig saw puzzles or picture puzzles of the jig saw type as "games" under prior revenue laws well warrants the inference that this is the construction which should be placed upon those words as used in the Revenue Act of 1932. This Court has frequently held that where the meaning of a statute is doubtful, great weight will be given to the construction placed upon it by the department which is charged with its execution and that the reenactment of the statute without change is an adoption by Congress of a long continued prior executive construction.

Robertson v. *Downing,* 127 U. S. 607.
United States v. *Hermanos,* 209 U. S. 337.
Komada & Co. v. *United States,* 215 U. S. 392.
United States v. *Falk,* 204 U. S. 143, 152.

Brewster v. *Gage*, 280 U. S. 327, 337.
National Lead Co. v. *United States*, 252 U. S. 140.
Edwards v. *Wabash Railway Co.*, 264 Fed. 610.

The record in the case at bar discloses that from February 25, 1919 to December 31, 1921, jig saw and picture puzzles were manufactured and sold without being subject to tax as "games" (R. 19). Nor were they taxed as "games" under the Revenue Act of 1917, which was in force from October 4, 1917 to February 25, 1919. The record further discloses that the provisions of the Revenue Acts of 1917 and 1918 imposing a tax on games were reenacted substantially without change in the Revenue Act of 1932 and that the administrative interpretation under which jig saw picture puzzles were not taxed was of long duration. The uncertainty and vacillation of the Commissioner, and his contradictory rulings both before and after his decision in S. T. 567, as shown by the record, and the decision of the Circuit Court, unquestionably present a situation which also distinguishes the case at bar from the ouija board case upon which the petitioner relies to establish a conflict.

If there were any doubt as to the applicability of Section 609 of the 1932 Act to jig saw picture puzzles, such doubt, in view of the foregoing, would have to be resolved in favor of the taxpayer, under the rule in *Gould* v. *Gould*, 245 U. S. 151. But, as was pointed out by the Court below (R. 62), under the circumstances of this case, there is "no reason for resorting to that expedient here".

6. Finally, it is submitted that the taxation of all

articles which furnish "sport, recreation or amusement" as "games" would lead to absurd results. There are many things besides "jig saw picture puzzles" which furnish sport, recreation, amusement or diversion, such as books, magazines, horses, automobiles, radios, phonographs, violins, pianos and other musical instruments, toys, such as microscopic outfits, magic material sets, railroad tracks and cars, paint, erector and skyscraper sets, building blocks, chemical, electrical and tool sets, etc., yet no one would call them games and they are obviously not taxable as games. Even the articles which are not subject to tax as sporting goods or games under Regulations 46, Article 56 (*supra*, p. 3), are designed to furnish sport, recreation, amusement or diversion. If the test of taxability of games and parts of games under Section 609 is whether the article is designed to furnish sport, recreation, amusement or diversion, there is no logical basis for differentiation between jig saw picture puzzles, on the one hand, and the articles specified in Regulations 46, Article 56, and the many articles enumerated in this paragraph, on the other.

7. The decision of the Circuit Court of Appeals in the case at bar is an application of the rule of primary adaptation and use which was adopted by this Court in *Universal Battery Co.* v. *United States*, 281 U. S. 580.[1]

The test in determining whether or not an article is taxable as a game is the same as that applied in deter-

[1] See, *accord*: *American Chain Co.* v. *Hartford-Conn. Trust Co.*, 11 F. Supp. 770 (D. C., D. Conn. 1931); *United Shoe Machinery Co.* v. *White*, 13 F. Supp. 97, 101; *Hygrade Food Products Corp.* v. *Chicago, M., St. P. & P. R. Co.*, 10 F. Supp. 767, 770; *Kamco, Inc.* v. *United States*, 10 F. Supp. 588, 591 (Ct. Cl., 1935); *Dalton & Balch* v. *United States*, 8 F. Supp. 727 (Ct. Cl., 1934), at page 729.

mining whether or not an article is an automobile part or accessory. It is not the use to which the article may be put, but the use for which the article is primarily intended and adapted. This rule of primary adaptation and use is followed by the Commissioner in Regulations 46, Article 56 (p. 3, *supra*). The articles therein exempted may all be used in a spirit of competition, yet they are not primarily adapted to or intended for such use.

With respect to the picture puzzles in controversy in the instant case, while they might be used by two or more persons in competition, they were unquestionably manufactured and primarily designed for the amusement of one person. The Court below ruled that jig saw picture puzzles are not designed for use in games of contest and that the putting together of a jig saw picture puzzle involved no competition and only one participant.

If the test of taxability is not primary adaptation and use, anything could be taxed as a game. Ordinary rope, for example, is used in a tug-of-war. In the familiar pie-eating contest, the element of competition does not make the pies subject to tax as games. Cross word puzzles are adapted to, and used in, competitive play, and they are not and never have been taxable as games. There is, in fact, an unreported ruling that cross word puzzles are not taxable as games (R. 18, 19, 31). It is accordingly submitted that the decision of the Court below was, in this aspect of the case, in harmony with the rule of primary adaptation and use.

The petitioner's statement also alludes to the possibility of competition against time in the solution of these puzzles. But this cannot be the test of taxability for competition against time applies as well to articles

which are not taxable as to those which are taxable under Section 609 of the Revenue Act of 1932. Two persons might match their speed in reading a book or knitting a sweater, yet the element of competition against time would not make the article used taxable as a "game". In the case of parallel bars, which are expressly exempt from taxation under Article 56 of Regulations 46, it is likewise possible to use them in a contest or competition against time, yet that possibility does not bring them within the scope of the statute. So in the case of cross word puzzles, the record shows that the object in their solution is to see who can do them the fastest (R. 31) and that there are no rules for their solution, yet they are not and never have been taxable as games. This difference in treatment by the Commissioner of jig saw picture puzzles, on the one hand, and cross word puzzles, on the other, does not lend itself to logical explanation.

It is therefore submitted that the decision of the Circuit Court of Appeals, under the circumstances of this case, is entirely correct and in accord with the well established rules of statutory construction.

IV. THE CASE AT BAR PRESENTS NO ISSUE OF GENERAL IMPORTANCE.

Petitioner argues that the construction adopted by the Court below restricts the operation of the statute and casts doubt upon its application. It is submitted, however, that, if anything, the application of the statute is distinctly clarified and its scope clearly defined. If Congress desires to tax puzzles as a class, or jig saw picture puzzles alone, it is a simple matter for Congress to mention them in the list of articles subject to excise taxes. The courts will not condone the

adoption by the Commissioner of Internal Revenue of a construction of the statute which would amount to administrative legislation.

CONCLUSION.

It is respectfully submitted that the decision of the Circuit Court of Appeals that the particular article sought to be taxed is a "puzzle" and not a "game" is correct and in accord with established precedent. The petitioner has had a careful review of his contentions and there does not exist any occasion for further review by this Court. There is no conflict of decisions nor even a conflict of reasoning. Nor is the question of taxability of jig saw or picture puzzles as games one of general importance, since Congress may amend the statute to impose a tax upon puzzles in the future, if it sees fit to do so. No broad or doubtful question of great moment is presented for settlement. It is accordingly submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for the Respondent.

April, 1937.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 20.

THOMAS W. WHITE, individually and as former Collector of Internal Revenue,

Petitioner,

v.

PHILIP J. ARONSON, Trustee,

Respondent.

BRIEF FOR THE RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 20.

THOMAS W. WHITE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, PETITIONER,

v.

PHILIP J. ARONSON, TRUSTEE, RESPONDENT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Massachusetts (R. 10–14) is reported in 13 F. Supp. 913. The opinion of the Circuit Court of Appeals for the First Circuit (R. 59–62) is reported in 87 F. (2d) 272.

JURISDICTION.

The case is before this Court on a writ of certiorari, a petition for same having been granted on May 3, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The sole question presented for the determination of this Court is whether the jig saw picture puzzles in controversy were subject to tax as "games and parts of games" under Section 609 of the Revenue Act of 1932.

STATEMENT.

The petitioner, in order to buttress his argument that there is substanial evidence in the record to support the general finding of the trial court, even under the definition of the word "game" adopted by the Circuit Court of Appeals, has made a strained effort to collect under his Statement evidence which is assumed to have this probative value. This evidence is considered *infra,* page 26.

The attention of the Court is invited to the following facts, not mentioned in petitioner's Statement, which are undisputed and conclusively established by the record in the case at bar.

Jig saw puzzles and picture puzzles of the jig saw type have been manufactured since the early part of the Nineteenth Century and perhaps as early as the American Revolution (R. 16, 19). The unanimous opinion of experts and of manufacturers and distributors of both games and jig saw puzzles is to the effect that a jig saw puzzle or picture puzzle of the jig saw type is not a game (R. 15, 23, 25, 29, 35). In the terminology of the trade a jig saw puzzle is not a game (R. 15, 23). The word "game", in its trade signification, means articles or instrumentalities employed in a contest between two or more persons according to a set of rules, where there is competition, an uncertain outcome and a winner and loser (R. 16, 23, 25, 31, 35).

There are no rules, however, for the solution of a jig saw puzzle (R. 16, 26, 31). The word "game", in the terminology of the trade, never includes either puzzles or toys, all three constituting separate and distinct types or categories of amusement devices (R. 15, 24).

Children are at least as adept as adults in solving jig saw puzzles and sometimes they are rather smarter than their parents in doing them (R. 16, 26, 36). Children can solve picture puzzles in excess of 50 pieces (R. 16, 26) and the puzzles manufactured by the Viking Manufacturing Company, Inc., were as readily soluble by children as by adults. Even the 162 piece puzzle was too easy for children (R. 27, 30).

From February 25, 1919, to December 31, 1921, jig saw and picture puzzles were manufactured and sold without being subject to tax as games under the provisions of Section 900 (5) of the Revenue Act of 1918 (R. 19). On August 26, 1932, the Commissioner made an unpublished ruling that jig saw puzzles were not subject to tax under Section 609 of the Revenue Act of 1932 (R. 20). This ruling was reversed on February 7, 1933, the ruling being given prospective operation only (Deft's Ex. A, R. 39). On April 20, 1933, the ruling of February 7 was again reversed in part, the tax being given retroactive effect to puzzles made on or after June 21, 1932 (Deft's Ex. B, R. 40). No tax was assessed or collected with respect to sales of jig saw or picture puzzles prior to the ruling of the Bureau of Internal Revenue in S. T. 567, published on November 14, 1932 (R. 19, 41).

In holding that the article in controversy was not subject to tax under Section 609 of the Revenue Act of 1932, the Circuit Court of Appeals ruled that the article

here sought to be taxed is a puzzle (R. 61) and not a game.

STATUTE, REGULATIONS AND RULING INVOLVED.

1. Revenue Act of 1932, c. 209, 47 Stat. 169:

"SEC. 609. TAX ON SPORTING GOODS.

"There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, *chess and checker boards and pieces, dice, games and parts of games* (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods." (U. S. C., Title 26, c. 20B, p. 1186.) (Italics ours.)

2. Regulations 46, promulgated under the Revenue Act of 1932 by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury on June 18, 1932, provide:

"ART. 53. SCOPE OF TAX.—The tax attaches to sales by the manufacturer of the articles enumerated in section 609 as well as to *all similar articles commonly or commercially known as* sporting

goods, *games, and parts of games* (except playing cards and children's toys and games).

"The term 'sporting goods' includes all articles *of the same general character as those specifically named,* the purpose of which is primarily for use either indoors or outdoors in connection with a game or sport. (Italics ours.)

"The term 'game' includes games of skill or chance and every contrivance, device, or combination of articles which is designed to furnish sport, recreation, or amusement. Games of the type ordinarily played or used by adults, as distinguished from games designed for the use of children, are subject to the tax.

"ART. 55. GAMES.—Among the articles subject to tax as games are dice, chess and checker sets, ping-pong sets, roulette wheels, backgammon sets, etc.

. . . . . .

"ART. 56. ARTICLES NOT SUBJECT TO TAX.—Gymnasium and playground equipment, including rowing machines, trapeze rings, punching bags, dumbbells, Indian clubs, parallel bars and similar articles, are not subject to tax as sporting goods or games."

. . . . . .

3. XI-2 Cumulative Bulletin 481: XI-46-5856

REGULATIONS 46, ARTICLE 55: Games S. T. 567

"Taxability of jig saw puzzle as a game.

"Advice is requested concerning the taxability, under section 609 of the Revenue Act of 1932, of jig saw puzzles as games.

"The word 'games', as used in section 609 of the Revenue Act of 1932, does not mean the games

themselves but the instrumentalities used in playing them. (See *Baltimore Talking Board Co.* v. *Miles,* 280 Fed., 658, T. D. 3401, C. B. I-2, 297). Under the strict interpretation of that word all picture puzzles could be classified as games and held to be taxable. However, children's games are specifically exempted from the tax. It would follow that if the picture puzzles, or games, are of the type ordinarily designed for the use of children, they are not taxable.

"A jig saw puzzle containing comparatively few pieces may properly be considered as one so simple as to warrant classification as a children's game and exempt from the tax. Where such puzzles contain many pieces they become more complex and are taxable on the ground that they are designed for use by adults. For revenue purposes, it is held that if the jig saw puzzle contains 50 pieces or less, it is a children's game and not subject to the tax. If the jig saw puzzle contains more than 50 pieces it is subject to the tax as a game under section 609 of the Revenue Act of 1932."

SUMMARY OF ARGUMENT.

On the facts disclosed by this record and the applicable rules of statutory construction, the decision of the Circuit Court of Appeals is correct. In commercial or trade usage a puzzle is not a game. The fact that the article in controversy is not a game in the terminology of the trade is conclusively established by the record. The law is clear that the word "game" in Section 609 was used by Congress in this sense in which it is understood by the trade. *Philadelphia Storage Battery Co.* v.

Lederer, 21 F. (2d) 320, *Monroe Cider, Vinegar & Fruit Co.* v. *Riordan,* 280 Fed. 624.

The construction adopted by the Circuit Court of Appeals is not only the meaning of the word "game" in trade terminology but also its common and ordinary meaning. Tested by the rule of primary use or adaptation (*Universal Battery Co.* v. *United States,* 281 U. S. 580) the article in controversy is not a game. The jig saw picture puzzle is not primarily designed for or adapted to use as a game and the mere possibility of its use in competition does not make it a game, since many articles which are admittedly non-taxable may be adapted to competitive use. The petitioner's argument would apply with equal force to the cross word puzzle, as to which there has been a ruling that it is not taxable under Section 609. The discrimination between jig saw picture puzzles on the one hand and cross word puzzles and other types of puzzles, on the other hand, has not been and can not be satisfactorily explained by the petitioner.

The petitioner's argument that jig saw picture puzzles are taxable as "games" because they afford recreation, amusement or diversion is founded upon a patent fallacy. Because a game is defined as an amusement or diversion, it does not follow that everything which furnishes amusement or diversion is a game. *Illfelder* v. *United States,* T. D. 31115, 19 T. D. 59.

There is no substantial evidence in the record to support a finding of fact that the articles in question are games, but the general finding of the District Court is not a finding that such is the fact, but rather a mixed conclusion of law and fact which is based upon an erroneous constuction of the statute.

Notwithstanding the strained effort of the petitioner

to bring the article in controversy within the definition of "game" adopted by the Circuit Court of Appeals, it is obvious that a puzzle is basically and generically different from a game and that Congress, in imposing a tax upon games, did not intend to include puzzles of any kind.

The decision of the Circuit Court of Appeals finds support in the doctrines *ejusdem generis* and *noscitur a sociis*. The definition for which petitioner contends would lead to utterly absurd consequences since it would obviously bring within the application of the statute innumerable articles which are not games, even though they do afford recreation, amusement or diversion.

The construction which was adopted by the Circuit Court of Appeals finds ample support in the legislative history of the tax on games as enacted into the Revenue Act of 1932 and prior revenue laws. The administrative construction or interpretation under these prior revenue laws supports the contention of the respondent in this case that jig saw picture puzzles are not taxable. The failure of the Commissioner to tax jig saw picture puzzles under the 1917 and 1918 Acts, although they were well known commercially and popularly, shows that the administrative construction prior to the ruling in S. T. 567 on November 14, 1932 was that jig saw picture puzzles were not taxable as games.

The ruling of the Commissioner which imposes a tax upon puzzles containing in excess of 50 pieces is arbitrary, unreasonable and violative of the Fifth Amendment to the Constitution of the United States. The record discloses that the basis of classification adopted was entirely unreasonable, the difficulty of such puzzles being dependent not so much upon the number of pieces they contain as upon other factors, such as the size of

the pieces, shape of the cuts, coloring, etc. (R. 16, 32, 36).

The ruling of the Commissioner in S. T. 567 was preceded and followed by inconsistent rulings on the same subject matter, which disclose his uncertainty as to the taxable status of the jig saw picture puzzle. The construction adopted by the Commissioner should not be sustained, since it constitutes an unwarranted assumption of broad powers of statutory construction by an administrative official, powers which, as the record discloses, are tantamount to an improper exercise of the legislative and judicial function.

While there can be no doubt that the construction adopted by the Circuit Court of Appeals is correct, if any doubt exists the case calls for the application of the well known rule of doubt. *Gould* v. *Gould,* 245 U. S. 151.

There is nothing in the ouija board or slot machine cases which is inconsistent with the decision of the Court below. The decision in the slot machine case supports rather than weakens the construction for which the respondent contends. Each case must be decided on its own facts. While there is language in those cases which seems to support a broader construction of the word "game" than was adopted in the instant case, those decisions were correct on their facts. The decision of the Circuit Court of Appeals that jig saw picture puzzles were not intended to be taxed as games under Section 609 is not in conflict with the decisions in the oujia board and slot machine cases, and if there is any conflict in reasoning, the construction adopted by the Court in the case at bar is more reasonable than the broader construction for which the petitioner contends.

ARGUMENT.

I. IN ITS COMMERCIAL OR TRADE USAGE A "PUZZLE" IS NOT A "GAME".

The uncontradicted evidence in the record establishes the fact that a "puzzle" is not a "game" in the language or terminology of the trade. Mr. George S. Parker, who testified to this effect (R. 15, 16, 21, 22), has been a manufacturer and inventor of both games and puzzles for over fifty years and is probably the outstanding expert in his field. He stated that in the terminology of the trade the word "game" never includes either puzzles or toys; that, in his opinion, a jig saw puzzle is not a game and never was; that, as a manufacturer of games and puzzles, he would define a game as "a contest between players or sides, as usually expressed, for the purpose of determining the winner and for the purpose of amusement", and according to a set of rules; and that a "puzzle" is simply a "puzzle" and is so understood commercially. The evidence of other witnesses (R. 23–26, 29, 31, 35, 36) was to the same effect. Nor is there any evidence to the contrary.

The respondent submits that the words "games and parts of games" were used in Section 609 of the Revenue Act of 1932 in the sense in which they were understood by the trade. That section imposes a tax upon certain articles sold by "the manufacturer, producer, or importer", and since it is directed to a particular class, it is logical to conclude that the words employed by Congress were used in their commercial sense as understood by that class.

Nix v. *Hedden,* 149 U. S. 304, 13 S. Ct. 881, 37 L. Ed. 745.

Sonn v. *Magone,* 159 U. S. 417.

Monroe Cider, Vinegar & Fruit Co. v. *Riordan*, 280 Fed. 624.

Philadelphia Storage Battery Co. v. *Lederer*, 21 F. (2d) 320.

In *Nix* v. *Hedden, supra,* this Court held that a tomato was taxable as a "vegetable" although, in its botanical sense, it was a fruit, "there being no evidence that the words 'fruit' and 'vegetable' have acquired any special meaning in trade or commerce . . ." (at p. 306).

In *Monroe Cider, Vinegar & Fruit Co.* v. *Riordan, supra,* the Court, in holding that sweet cider was not taxable as a "soft drink", expressly relied upon the trade significance of the term "soft drinks". It was said in that case (p. 629):

> "It is plain that the term 'soft drinks', had a *trade significance* and comprehended different kinds of soft drinks, as used in the 1917 Act.
>
> ". . . Congress was clearly using this expression 'soft drinks' not to distinguish one class of beverages from another from the viewpoint of a prohibition or license act, but to distinguish soft drinks from the other items of the statute from a *technical trade-name aspect.*" (Italics ours.)

The attention of this Court is particularly invited to the admirable language of Judge Dickinson in the case of *Philadelphia Storage Battery Co.* v. *Lederer, supra,* in which it was held that storage batteries were not "parts or accessories" for automobiles within the meaning of Section 900 of the Revenue Acts of 1918 and 1921. He said (pp. 321, 322):

> "The argument for the plaintiff begins of course by invoking the doctrine that tax laws, as the ex-

pressions go, are to be construed 'most strongly' against the United States and 'most favorably' to the taxpayer. The true doctrine, as it has been stated to be, is that neither the executive nor the judiciary nor both combined can directly impose a tax. What cannot be done directly cannot be done by indirection under the guise of construing a tax law. Congress alone has the power to tax.

"This takes us to the act itself. It is not an altogether correct view, but, for the purposes of the case, we may look upon this as a tax imposed upon things, those which are taxed being designated by the names which Congress has applied to them. We thus find what is taxed by finding the things which bear the names or labels which Congress has applied to what is taxed, and we recognize them by names or labels by which so designated. If the thing claimed to be taxed is not so known, then it is not subject to the tax. *Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them. The command here is directed to 'manufacturers, producers and importers' of the 'articles' named. It is, because of this, a fair inference that Congress spoke to them in their own language. This means that the phrases of the law are to be given the meaning they have in the trades concerned.*

. . . . . .

"As we view it, the question is one of identification, and the test is whether the 'article' attempted to be taxed is the 'article' upon which the tax has been imposed by law. *This brings it pretty close to a question of trade nomenclature or terminology.*

"Our finding is that there is no such thing as an 'automobile storage battery' or a 'storage battery for automobiles' in the nomenclature of the trade, and no 'article' or thing so known. It follows that the plaintiff did not make or sell any. What it sold were 'storage batteries', and they are not taxed by the Act." (Italics ours.)

Under these authorities the terminology of the trade is an important factor in determining the construction to be given to the phrase "games and parts of games" in the statute under consideration. The Commissioner himself has recognized the force of these decisions in ruling on the taxability of other articles under the excise tax provisions of the Revenue Act of 1932. In S. T. 823 (XIV-2, Cumulative Bulletin 369), for example, he said, in holding that electrical transcriptions used for broadcasting purposes and motion-picture records of the "sound-on-disk" type are not taxable as "records for phonographs" under Section 607 of the Act:

"There is strong and ample judicial authority for the view that for the purposes of the excise tax the Bureau should ascertain the *commercial significance* of the words 'records for phonographs' and construe them accordingly. (*American Net & Twine Co.* v. *Worthington,* 141 U. S. 468; *Sonn* v. *Magone,* 159 U. S. 417; *Philadelphia Storage Battery Co.* v. *Lederer,* 21 Fed. (2d), 320.) From evidence submitted it is obvious that in the industry concerned a very definite distinction is made between phonograph records and electrical transcriptions and that the latter are not *commercially known* as 'records for phonographs'." (Italics ours.)

The trial court said, on the question of trade terminology (R. 18):

> "I do not care how the trade felt about it. It is going to be how this court feels about it that determines it."

The refusal to give this undisputed evidence the weight to which it is entitled under the adjudicated cases was substantially prejudicial to the plaintiff and, in and of itself, warranted the reversal of its judgment by the Circuit Court of Appeals.

II. IN ITS COMMON AND ORDINARY MEANING A "PUZZLE" IS NOT A "GAME".

Entirely apart from the overwhelming and uncontradicted evidence in this record that the word "games" does not include puzzles, in the terminology of the trade, it is submitted that there are inherent differences between "puzzles" and "games", in their ordinary and accepted meaning, which militate against the construction for which the petitioner contends.

In Webster's New International Dictionary (2nd Edition, Unabridged, 1935) seventeen definitions are given of the word "game". In none of them is the word "puzzle" referred to. The most detailed definition is the fourth definition, which is as follows:

> "A contest, physical or mental, conducted according to set rules, and undertaken for amusement or recreation, or for winning a stake. *Games of chance* include all games in which chance is the sole or a considerable factor in determining the outcome, as in dice and in most card games. Most gambling games are of this description. *Games of skill* include those in which skill is the sole or chief

factor, as in chess, whist, draughts, billiards. *Athletic games* include all contests having in view the development or exercise of muscular strength, skill, or agility, as baseball, football, tennis, the field and water sports, etc. *Cf.* SPORT. The public contests of the ancients, which included dramatic shows as well as athletic contests, were called *games* in English. See AGON."

The same dictionary defines "puzzle" as—

"Something which perplexes or embarrasses; a difficult problem or question; an enigma; hence, a toy, contrivance, question, or problem designed for testing ingenuity; as a cross word *puzzle*."

And a "jig saw puzzle" as—

"A kind of puzzle made by sawing or cutting a picture into small pieces which may be fitted together."

In Murray's Oxford Dictionary (1933) a "jig saw puzzle" is defined as—

"A puzzle formed by cutting into small irregular pieces with a jig saw a picture mounted on a sheet of thin wood."

In holding that the article in controversy is not taxable under Section 609 of the 1932 Act the Circuit Court Court of Appeals expressly ruled that "A jig saw picture puzzle comes squarely within this definition,—'a contrivance . . . designed for testing ingenuity'." (R. 61.)

The word "puzzle" has always had a well known and distinct meaning in the English language. The picture puzzle is of ancient origin and is one of the oldest pas-

times known to man.[1] The dictionary definitions of the word "puzzle", as well as the evidence in this record (R. 15, 16, 19), convincingly establish the fact that puzzles in general and picture puzzles of the jig saw type in particular bear no kinship to "games" as ordinarily understood.

A game is always played according to a set of rules and its outcome is always uncertain. The ultimate score or result can never be predicted with certainty beforehand, since a game is capable of variations. There is no pre-knowledge of the result, score or outcome.

A jig saw picture puzzle, on the other hand, is a problem with only one correct answer or solution. There are no rules applicable, each person solving it in his own way. There is no scoring, no uncertain or variable result. It is in fact incapable of variations and its outcome can be predicted with certainty. As with a mathematical problem, there is only one correct answer or result—the completed picture.

Thus the construction of the phrase "games and parts of games" adopted by the Circuit Court of Appeals is not only the meaning in the trade but is the common and ordinary meaning of the phrase in everyday language.

Oehley v. *Rex* (1908) E. D. C., p. 38 (Cape of

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[1] The picture puzzle was known in China and Egypt thousands of years ago. In Murray's Oxford Dictionary (1909) a Chinese puzzle is defined, under the general term "puzzle", as—

> "One of the ingenious puzzles made by the Chinese in which the problem is to fit together the dissected pieces of a geometrical or other figure . . . The name was applied first to the dissected square called 'tangram', hence, fig., any specially intricate puzzle or problem."

So, in Facts—The New Concise Pictorial Encyclopedia, a jig saw puzzle is described as follows:

> "Jig saw puzzle, consisting of many pieces of 'thin' wood or cardboard cut in different shapes which, when correctly fitted together, form a complete picture. Known in ancient Egypt."

Good Hope Law Reports, Eastern Districts Court).

In this case the defendants were convicted of playing a game on the Lord's Day in violation of an ordinance. The Court allowed the defendants' appeal and quashed the conviction and sentence. Judge Graham said (pp. 41, 42):

"In my opinion the section does not make it an offence to indulge in pastimes or amusements on the Lord's Day, if such are not in the nature of a game. Now, in Webster's Dictionary 'game' is defined as 'a contest according to certain rules for amusement or for winning a stake'. In Murray's Dictionary the following definition is given: 'A diversion of the nature of a contest, played according to rules, and displaying in the result the superiority, skill, strength or good fortune of the winner or winners.' It is true that both these authorities also give a wider meaning to the word, embracing amusements, delight, pastimes and sport of any kind, but if this wider interpretation were given to the word as used in the section, it would lead to a very far-reaching and intolerable interference with the liberty of the public. It would be improper to contend, in my opinion, that a person would be liable to prosecution under this section, who walked or ran in an open or public place, who rode along a road on a horse or bicycle, who sculled up a river in a boat, or who indulged in the gentle art of fishing on the Lord's Day, and yet in each of these cases such person may have been amusing himself according to his lights, and may indeed have been practicing or training for the purpose of playing a

game, at some future date, but he would not, in my opinion, be playing a game as contemplated by the words of the Ordinance."

Judge Kotze said (pp. 42, 43):

"The accused are charged with playing the game of golf. If it be held that a game is a contest of some kind, whether according to rule or not, then it cannot be played alone. *Such is certainly the ordinary meaning of a game*, and the Ordinance does not give any definition of the term showing that we must attach a different meaning to it. Once it be held that a game is a contest, then persons playing singly on different links or greens are not playing a game. According to the record, a Crown witness, on whose testimony the Crown relied, stated that the game of golf cannot be played by one person, but that there must be two or more sides. Consequently, upon the prosecution's own showing, and the rules of golf put in, each single and individual accused playing by himself was not playing the game of golf, as laid in the charge. I am aware that the most general definition, and in fact the etymological meaning of 'game' includes any sport, fun, frolic or pastime. But, as my brother Graham has remarked, if we accepted that meaning we should be going very far in curtailing the liberty of human beings." (Italics ours.)

While the Court here was construing a penal rather than a taxing statute, its remarks concerning the ordinary meaning of a game as a contest are none the less applicable to the circumstances in the instant case.

In *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, upon which the petitioner relies (Br., p. 11) the

decision was obviously based upon the fact that sweet milk chocolate was popularly regarded as "candy" and commercially sold as candy. In that case both the popular and commercial meaning coincided with the more general definition of the word "candy". In the case at bar, however, the popular and trade meaning of the word "game" is not the almost limitless definition upon which the petitioner relies, but the more restricted definition which was adopted by the Circuit Court of Appeals.

It is argued by petitioner (Br., p. 14) that the view of the Circuit Court of Appeals would eliminate the familiar "game" of solitaire from the class of games. This is by no means the case. The issue before the Court is the construction of a taxing act which may be described, somewhat loosely but adequately for this purpose, as imposing a tax upon the tangible articles embraced within its scope. "Solitaire" is not an article or instrumentality used in the playing of a game. Solitaire is a game, it is true, which one person can play alone, but the playing cards which are employed are obviously manufactured and primarily adapted to use in games of contest. The game of solitaire is a method of use of a gaming instrumentality; the issue before this Court is whether jig saw picture puzzles are articles or instrumentalities designed for and used in the playing of a game. Moreover, it is generally recognized that solitaire is an exception to the usual rule. Webster's definition of it as "a game which one person can play alone" carries with it the inference that the word "game", as usually understood, requires play between two or more persons. Aside from the absence of a tangible opponent, although solitaire is frequently played between persons or sides, in every other respect it partakes of

the nature of a game since it has distinct rules of play, a method of scoring and an uncertain outcome. These elements are lacking in the case of the jig saw picture puzzle.

III. TESTED BY THE RULE OF PRIMARY USE OR ADAPTATION, A PICTURE PUZZLE OF THE JIG SAW TYPE IS NOT A GAME.

The petitioner's contention that Section 609 imposes a tax upon every article designed to furnish sport, recreation or amusement is founded upon a patent fallacy, reminiscent of the familiar example of *non sequitur:* "All horses are four-legged animals, therefore all four-legged animals are horses." Because in one of the definitions of the word "game" it is defined as an "amusement or diversion", it does not follow that all amusements and diversions are "games". The sign of equality does not always import definitive limits which coincide. In the case at bar the petitioner's definition confuses the outer bounds of the *genus* with the narrow confines of the *species.*

This Court has laid down a test of taxability, in connection with the excise tax on other articles, which should govern in determining what falls within and what without the application of Section 609. That is the test of *primary use or adaptation.*

> *Universal Battery Co.* v. *United States,* 281 U. S. 580.

In this case, the Court said, in construing Section 900 of the Revenue Acts of 1918 and 1921, imposing a tax upon "automobile parts and accessories" (pp. 583, 584):

> "The administrative regulations issued under section 900 uniformly have construed the term 'part'

in that section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use but is *primarily adapted for use* as a component part of such vehicle. The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is *primarily adapted for such use,* whether or not essential to the operation of the vehicle.

"This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. . . . We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles *primarily adapted for use* in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted." (Italics ours.)

This rule has also been followed by the Commissioner in Regulations 46 under the Revenue Act of 1932. By Article 53 the tax is held applicable to the articles enumerated in Section 609 and "to all similar articles *commonly or commercially known* as sporting goods, games, and parts of games . . ." (Italics ours.) The test of primary use and adaptation was expressly incorporated by the Commissioner into the definition of "sporting goods" in the Regulations and has been sub-

sequently applied by him in various sales tax rulings under these Regulations.[2] His enumeration in Article 55 of articles illustrative of the things taxable as games is limited to articles *primarily designed for and adapted to* use in games of contest. No mention is made anywhere in the Regulations of the jig saw picture puzzle or any other type of puzzle as being taxable under the statute. With respect to the articles held to be non-taxable under Article 56—gymnasium and playground equipment, including rowing machines, trapeze rings, punching bags, dumbbells, Indian clubs, parallel bars—none of them is primarily intended for and adapted to use in sport or games. Yet,—and this, it is submitted, is of no little significance,—all of them are capable of use in competition among contestants or in "competition against time" and all of them are designed to furnish "sport, recreation or amusement". By what process of reasoning can the exemption of these items and the inclusion of jig saw picture puzzles into the category of "games" be reconciled or defended?

Respondent readily admits two things about the jig saw picture puzzle, both of which are obvious: first, that it is one form of recreation, amusement or diversion, and second, that it can be adapted to use in a contest. He contends, however, that Congress, in imposing a tax upon "games and parts of games", intended to reach only such articles as are primarily intended for

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[2] See, for example, S. T. 835, XV-1 Cumulative Bulletin 396, where it was held that shoes which are readily usable for general outdoor wear and not especially designed for use in sports are not subject to the tax imposed by Section 609: S. T. 852, XV-2 Cumulative Bulletin 341, in which it was held that any article of clothing designed, intended, or specially adapted for use in the playing of a game or sport as distinguished from an article of clothing of general wear with only a possible or incidental use in playing a game or sport, is taxable as a uniform under Section 609. See also S. T. 542, XI-2 Cumulative Bulletin 480.

and adapted to use by two or more persons in playing a game as defined in the fourth dictionary definition referred to above, namely, games of contest. This definition of a "game" as a contest makes specific reference to articles such as dice, chess, billiards, baseball, football, tennis, etc., all of which are expressly mentioned in Section 609. It seems apparent, as the Circuit Court of Appeals held (R. 62), that aside from the articles such as skates, skis, fishing rods and reels, etc., which have no relation to games and are taxed as "sporting goods" *per se,* the underlying thought was to reach articles which are used in games of contest, whether physical or mental. The language of Section 609, when construed as a whole, discloses that Congress had in mind games of contest rather than every article or device which affords recreation, amusement or diversion. And it can not be disputed, on the record in this case, that the jig saw picture puzzles in controversy, like crossword puzzles, are primarily designed, adapted and intended for the amusement of one person alone, the individual who solves them.

The Circuit Court of Appeals correctly ruled that jig saw picture puzzles are not designed for use in games of contest and that the putting together of a jig saw picture puzzle involves no competition and only one participant (R. 60). An examination of the puzzles in evidence (Plff's Ex. 2) shows unquestionably that they were manufactured and primarily designed and adapted for the use and amusement of the individual.

Unless this test of taxability is adhered to there would be no safe standard or guide for the taxpayer to follow. The distinction which has been drawn is between possible use and intended use. It is, for example, possible to use an ordinary rope in a tug-of-war, yet no argu-

ment would be countenanced that because the rope is susceptible of such use it is taxable as a "game" under Section 609. It is possible for two people to match speed in drinking a beverage yet the adaptation of the beverage to the purpose of the occasion would not make it a device taxable as a "game". In the familiar pie-eating contest there is the gaming element of competition with victory for one of the contestants, yet that does not rended taxable as "games" the pies which are used in the contest. It seems unnecessary to multiply these illustrations. Under the adjudicated decisions and upon the record in this case it is submitted that only such articles are taxable as "games" as are manufactured for that purpose and that, since the jig saw picture puzzles in controversy were *not primarily designed for use in games of contest,* they were not intended to be taxed under the provisions of Section 609.

IV. PETITIONER'S CONTENTION THAT THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE GENERAL FINDING OF THE TRIAL COURT IS WITHOUT FOUNDATION.

On the record in this case there can be no question that the decision of the Circuit Court of Appeals reversing the judgment of the District Court was a proper exercise of appellate jurisdiction to review. While the rule is well settled that an Appellate Court may review only such errors in law as are presented by the record, it is equally well settled that the appellate tribunal may consider the question whether, upon all the evidence, the judgment of the trial court is correct as a matter of law, where this question is preserved by the record.

In the instant case the plaintiff filed a motion for judgment at the conclusion of the trial (R. 8) and duly

saved his exception to its denial (R. 49). He also filed requests for rulings of law (R. 42–44) and duly saved his exception to the ruling of the Court denying such of the requests as were inconsistent with the opinion of the trial court (R. 49). Exception was also taken to the refusal of the trial court to grant the plaintiff's request for a specific ruling upon each of the plaintiff's requests for rulings of law (R. 50) and to the granting of the defendant's request for a ruling of law (R. 8, 49). Error was assigned as to all of these rulings (R. 53, 54).

This being the state of the record, the Circuit Court of Appeals clearly had jurisdiction to determine whether, upon all the evidence, the defendant was entitled to judgment as a matter of law.

Maryland Casualty Co. v. *Jones,* 279 U. S. 792, 795, 796, 49 S. Ct. 484, 73 L. Ed. 960.

City of St. Louis v. *Western Union Tel. Co.,* 148 U. S. 92, 96, 13 S. Ct. 485, 37 L. Ed. 306.

Fleischman Co. v. *United States,* 270 U. S. 349, 354, 46 S. Ct. 284, 287, 70 L. Ed. 624.

Harvey Co. v. *Malley,* 288 U. S. 412, 53 S. Ct. 426, 77 L. Ed. 866.

Eastman Kodak Co. v. *Gray,* 292 U. S. 332, 54 S. Ct. 722, 78 L. Ed. 1291.

Shepleigh v. *Mier,* 299 U. S. 468, 469, 57 S. Ct. 261, 81 L. Ed. 237.

See also

Armstrong v. *Metropolitan Life Ins. Co.,* 85 F. (2d) 185, 186 (C. C. A. 8, 1936).

Real Estate-Land Title & Trust Co. v. *Town of Fairfax,* 84 F. (2d) 675 (C. C. A. 10, 1936).

Pierce v. *Wyatt,* 83 F. (2d) 892 (C. C. A. 8, 1936).

Chesapeake & O. Ry. Co. v. *Indiana Fibre Products Co.*, 75 F. (2d) 193 (C. C. A. 7, 1935).

Willcuts v. *Stoltze*, 73 F. (2d) 868 (C. C. A. 8, 1934).

It is asserted by petitioner that the record discloses substantial evidence to establish the fact that jig saw picture puzzles are "games" under the construction adopted by the Circuit Court of Appeals and that it was therefore error to reverse the general finding. How utterly tenuous is this contention is apparent upon analysis of the so-called evidence upon which petitioner relies.

While it is true that during the time of the so-called picture puzzle craze neighbors and friends met together (R. 30, 36, 37), this does not establish the fact of competition or contest among them. If anything, it shows *co-operation* rather than competition in the solution of the puzzle. There is no evidence in this record of any competition or contest among them, or that jig saw puzzles are adapted to and widely used in competitive play.

Reliance is also placed upon the argument that there is "competition against time" in the solution of these puzzles. This is based upon the statement of a witness, in answer to a question from the Court (R. 31), that "the only competition there *could* be on the jig saw would be the relative time required by one to put them together . . ." Apparently the view is taken that the person solving a jig saw picture puzzle sits across the table in competition with a phantom opponent "Father Time". The witness was obviously not testifying to the existence of competition as a fact in the solution of these

puzzles. Indeed he went on to say (R. 31): ". . . but there are no rules. Everyone goes at it by their own methods." This fact is conclusively shown on the record and it cannot be brushed aside by the fanciful argument that the effort to complete the picture and to complete it in the shortest possible time constitute "rules of the game".

It is argued (Br., p. 13) that the exhibits disclose that they are games played according to rules. This argument is without foundation in the record and is clearly contradicted by the testimony in the record (R. 16, 26, 31). Moreover, whatever value such puzzles may have in developing mental faculties or the quality of patience, this certainly would not establish their character as a game.

The only evidence introduced by petitioner was two letters (Deft's Exs. A and B, R. 38, 40) containing inconsistent rulings of the Commissioner on the taxability of jig saw puzzles. No evidence was introduced to contradict the overwhelming testimony that jig saw picture puzzles are not in fact games in the terminology of the trade.

It is accordingly submitted that even if the general finding of the trial court should be treated as a pure finding of fact, that the jig saw picture puzzles in controversy are games, the record fails to disclose any substantial evidence or even a scintilla of evidence to support it. The general finding, however, was not a pure finding of fact. The opinion of the trial court (R. 10) clearly shows that it was based upon an erroneous construction of Section 609 which made it applicable to every contrivance designed to furnish sport, recreation, amusement or diversion. The puzzles in controversy were not found to be games as a fact, but were held to

be taxable under the broad construction of the phrase "games and parts of games" which was adopted by the trial court. The general finding was therefore not a pure finding of fact but rather a mixed conclusion of law and fact which was properly reversible if based upon an erroneous construction of the statute.

The argument of the petitoner that the articles in question are games because of their possible use in competition is, it is submitted, of little force. Of course it is possible to use jig saw picture puzzles in a contest, just as almost any article which is not a game as such could be adapted to such use. If the element of possible competition or "competition against time" were the test of a game, however, the word would obviously embrace many articles which are clearly not taxable under Section 609. The stories and articles in the magazine "Liberty" have a stated reading time but this does not make the magazine, story, or article taxable as a game. Competition against time exists in every field of human endeavor and the fact that it applies as well to non-taxable as to taxable articles destroys its validity as a rule for determining the taxability of jig saw picture puzzles. To found a tax on jig saw picture puzzles on such an unsubstantial basis would be to torture the language of the statute in order to bring within its application an article which by every rule of statutory construction was not intended to be taxed. Unless the rule of primary use or adaptation is adhered to—which rule the Commissioner himself has followed in Regulations 46 and in construing other portions of the statute—his power to determine what subjects are taxable as games would exceed all reasonable bounds.

The evidence in this record (R. 31) shows that there are no rules to cross word puzzles and that the object in

cross word puzles is to see who can do them the fastest, yet cross word puzzles are not and never have been taxed as games under Section 609, although they are quite similar to the jig saw picture puzzle. This Court may take judicial notice of the fact that there is no published ruling or regulation taxing cross word puzzles. As a matter of fact there is an unreported ruling that cross word puzzles are not taxable as "games" (R. 18). This statement was made by counsel for the plaintiff at the trial and was not denied by counsel for the defendant, nor was it denied when counsel for the defendant was called upon to produce this ruling (R. 19). Respondent feels warranted, therefore, in arguing that the accuracy of this statement is admitted and that the existence of this ruling is a fact of record. How then can it be urged that the jig saw picture puzzle is a game because of "competition against time" when there is evidence in the record that there is "competition against time" in cross word puzles (R. 31) and yet these puzzles are not taxed as "games" (R. 18, 19)? There is no evidence, on the other hand, that the time factor was of any importance in connection with the jig saw picture puzzles in controversy and the puzzles themselves, which are an original exhibit in this case (Plff's Ex. 2, R. 25) show that no standard of time was set or stated by the company for the solution of these puzzles.

The obvious unfairness and inconsistency of the Commissioner in imposing a tax on jig saw picture puzzles and exempting cross word puzzles from taxation reveals the untenable nature of the petitioner's argument in so far as it is based on the element of competition against time.

The question may be asked, why should Congress differentiate between games and puzzles and tax the one

and not the other? This question is best answered by asking another. Is there any reason why Congress should not tax fishing tackle or gymnasium equipment, punching bags, dumb-bells, parallel bars, etc., which are just as much articles of recreation and amusement as jig saw puzzles? The mere fact that Congress might have taxed puzzles is no reason for writing into the statute a word which is not there. In the *Monroe Cider, Vinegar & Fruit Co. case, supra,* the Court refused to do this very thing. Taxation by implication is not favored.

United States v. *Goldenberg,* 168 U. S. 95, 102.
In re Flatbush Gum Co., 73 F. (2d) 283; aff'g. 6 F. Supp. 909; Cert. den. *People of State of New York* v. *Arnold,* 294 U. S. 713.
Smietanka v. *First Trust & Savings Bank,* 257 U. S. 602, 42 S. Ct. 223, 66 L. Ed. 391.
Gould v. *Gould,* 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211.
Reinecke v. *Gardner,* 277 U. S. 239, 48 S. Ct. 472, 473, 72 L. Ed. 866.
Iselin v. *United States,* 270 U. S. 245.

In *United States* v. *Goldenberg, supra,* this Court said (p. 102):

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional and only arise when there are cogent reasons for believing that

> the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

Even if the failure to tax is inequitable this should not be considered in construing the statute. *Converse* v. *Northern Pac. Ry. Co.,* 2 F. (2d) 959. In the case at bar, however, every equity is in favor of the respondent. There can be no justification for the imposition by the Commissioner, on the basis of a mere administrative ruling, of a tax on manufacturers of jig saw picture puzzles to the exclusion of manfacturers of other types of puzzles and other types of non-competitive amusement devices. There is no published ruling or regulation taxing any other type of puzzle as a game. It is therefore submitted that the ruling of the Commissioner in S. T. 567 violates the sense of fairness by which we must assume Congress was guided in the enactment of this statute.

It would have been a simple matter for Congress to use the word "puzzles" if it had intended to tax puzzles. Moreover, if it were the intent of Congress to tax all kinds of amusement devices, including jig saw puzzles, it could have used the words "amusement devices" or some other apt phrase to express its intention. If Congress wishes to tax "puzzles" all that is necessary is to amend the law and supply the omission in the statute. Every consideration of fact and of logic supports the respondent's contention that it was not the intent of Congress to tax jig saw picture puzzles as "games".

As this Court said in *Iselin* v. *United States, supra,* at page 251:

> "What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

In the case at bar the omission of jig saw picture puzzles was intentional rather than by inadvertence and accordingly the case is stronger in calling for a refusal to supply an omission in the statute or to extend its scope by implication.

While the question has never been judicially determined whether or not a picture puzzle of the jig saw type is a game, there is ample precedent to support the respondent's position in the case at bar in analogous situations which have come to the attention of the courts.

Monroe Cider, Vinegar & Fruit Co. v. *Riordan*, 280 Fed. 624 (C. C. A. 2, 1922).

Casey v. *Sterling Cider Co.*, 294 Fed. 426 (C. C. A. 1, 1923).

In Monroe Cider, Vinegar & Fruit Co. v. *Riordan, supra,*[3] the question was whether sweet cider was included in the classification "other soft drinks" under the provisions of Section 628 of the Revenue Act of 1918, section (a), which, in part, imposed a tax—

"Upon all unfermented grape juice, ginger ale,

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[3] Cited and followed in *Phez Co.* v. *United States*, 25 F. (2d) 1011, 1012 (D. C., D. Ore. 1927), aff'd, *United States* v. *Phez Co.*, 28 F. (2d) 106, 107 (C. C. A. 9, 1928); *Inland Products Co.* v. *Blair*, 31 F. (2d) 867, 868 (C. C. A. 4, 1929); *Casey* v. *Sterling Cider Co., supra; Douglas* v. *Edwards*, 298 F. 229, 238 (C. C. A. 2, 1924); *United States* v. *Tod*, 297 F. 172, 174 (C. C. A. 2, 1924); *Salembier & Villate, Inc.* v. *McElligott*, 14 F. (2d) 984, 985 (D. C., S. D. N. Y. 1926).

root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and *other soft drinks*, sold by the manufacturer", etc.

Circuit Judge Mayer, who delivered the opinion of the Court, said (p. 626):

"If this case were to be decided by the dictionary definition of 'soft drink', then unquestionably sweet cider would be included; for according, for instance, to the Century Dictionary, 'soft drink' is 'any drink that is non-alcoholic, as lemonades, ginger ale, tea' etc. 'Cider', according to the dictionaries, was 'formerly any liquor made of the juice of fruits; now the expressed juice of apples either before or after fermentation.' 'Hard cider' is 'fermented cider.' 'Sweet cider' is 'cider before fermentation or cider in which fermentation has been prevented.'

"It is agreed by the parties, and it is a matter of common knowledge, that 'sweet cider' is a non-alcoholic beverage, and therefore, within the dictionary definition *supra*, is a soft drink, just as tea is a soft drink in the sense of a non-alcoholic beverage. If, therefore, Congress had intended that every non-alcoholic beverage should be taxed under section 628 *supra*, it would have been easy to frame a statute which would have read merely that there shall be levied, assessed, collected, and paid certain taxes upon "all soft drinks' or upon all drinks, whether fermented or unfermented, containing less than one-half of 1 per cent. of alcohol.

"It is a familiar rule of statutory construction that the legislative body is not presumed to use meaningless language, or, putting the rule another

way, that in ascertaining the legislative intent due consideration and weight shall be given to the words and phrases of a statute.

"The inquiry immediately suggests itself: In mentioning such well known drinks as ginger ale, root beer, and others why did Congress omit 'sweet cider' when it is probably the oldest non-alcoholic beverage of all the list set forth in section 628? The answer is to be found in the history of the legislation as illuminating the phraseological structure of the statute and in ascertaining the position of 'cider' in common knowledge and in the English language."

And Judge Mayer concluded his opinion (p. 634) in the following language:

"We are fully satisfied that sweet cider is not subject to the tax, but, in any event, it is plain that in this instance Congress has not expressed its intention to tax sweet cider in that clear and unambiguous language which must be present before it should be held that a particular article of commerce is subject to a tax statute which does not name it specifically and comprehends it only if a meaning be given to the term 'other soft drinks' which neither the history nor the structure of the statute justifies."

It is accordingly submitted that the definition of "game" adopted by the Commissioner of Internal Revenue in Article 53 of Regulations 46 and the ruling in S. T. 567 that jig saw puzzles containing more than 50 pieces are taxable as "games", are beyond the scope of the statute and constitute an improper exercise of legislative power by an administrative official.

Morrill v. *Jones,* 106 U. S. 466, 467, 1 S. Ct. 423, 27 L. Ed. 267.

United States v. *United Verde Copper Co.,* 196 U. S. 207, 214, 215, 25 S. Ct. 222, 49 L. Ed. 449.

Where a word is used by Congress which is susceptible of two interpretations, one of which, although an accepted definition of the term, would lead to absurd consequences, it is submitted that the other interpretation should be adopted, especially where the latter definition is well established and more nearly in accord with the popular conception of the term and its meaning in the trade.

The absurdity of the definition of "game" as "every contrivance, device or combination of articles which is designed to furnish sport, recreation or amusement" is patent. There are many things besides "jig saw picture puzzles" which furnish sport, recreation, amusement or diversion, such as books, magazines, horses, automobiles, radios, phonographs, violins, pianos and other musical instruments, cameras, motion picture machines and films, bicycles, fishing tackle, yachts, sailboats, the tools or instrumentalities used in wood carving, modelling, or gardening, toys, such as microscopic outfits, magic material sets, railroad tracks and cars, paint, erector and skyscraper sets, building blocks, chemical, electrical and tool sets, etc. No one would call these articles "games" and they are obviously not taxable as games. Even the articles which are expressly exempted from taxation as sporting goods or games under Regulations 46, Article 56 (*supra,* p. 5), are designed to furnish sport, recreation, amusement or diversion. If the test of taxability of games and parts

of games under Section 609 is whether the article is designed to furnish sport, recreation, amusement or diversion, there is no logical basis for differentiation between the articles specified in Regulations 46, Article 56, the other articles herein mentioned and the many other types of puzzles on the one hand, and jig saw picture puzzles on the other. It is quite apparent from the foregoing illustrations that while all games furnish amusement, recreation or diversion, all articles which furnish amusement, recreation or diversion are not necessarily games.

The contention of the respondent that the definition of the word "game" adopted by the Commissioner is too broad finds judicial support in the leading case of *Illfelder* v. *United States*, T. D. 31115, 19 T. D. 59, where it was held that the "sparkler", although intended mainly for the amusement of children, was not dutiable as a toy. Here the following rule of classification was laid down for purposes of the Tariff Act (p. 60):

> ". . . While some of the dictionaries and even some of the decisions define a toy to be any article *used* by children for their amusement, a thing the *main purpose or use* of which is the amusement of children, any article *primarily intended* for the entertainment and amusement of children, we can not admit that these definitions accurately or correctly define a toy as commonly or generally understood, including as they do many things not popularly recognized as toys. Manifestly such definitions are altogether too broad and are open to the very serious charge of inexactness. In fact, failing utterly to so describe a toy as to distinguish it from other things, and especially from things which are

not toys though serving to amuse children, they are wanting in the essentials of definition and are definitions only in name.

"A toy is a thing to amuse children, but it does not follow that everything which amuses children or which enters into a device for their amusement is itself a toy. *Wanamaker* v. *Cooper* (69 Fed. Rep., 465); *Thanhauser* v. *United States* (159 Fed. Rep., 228)."

In that case it was contended that because toys afford amusement to children, the sparkler was a toy, since it afforded amusement to children.

The fallacy of this argument was immediately perceived by the Court. It is the same fallacy which the petitioner is committing in the case at bar. No more is every article designed to furnish sport, recreation or amusement a "game" than is every article designed to amuse children a "toy".

Thus it is submitted that while one of the dictionary definitions of the word "game" is "an amusement or diversion", it was the intent of Congress to use the word in the more generally accepted sense of the fourth definition already referred to. Indeed the case at bar is a stronger one for disregarding the definition contended for by the petitioner than the soft drink cases, since in those cases the dictionary definition was completely ruled out, while in the case at bar the question is merely which one of two definitions is more nearly accurate as disclosing the intent of Congress.

It is therefore submitted that the ruling of the Circuit Court of Appeals that "as generally understood a 'game' involves a sport or diversion in which two or more persons contest" and "the word 'game' in the

phrase here under consideration means the same", is the correct interpretation and definition of the word "game" as used in Section 609.

The petitioner relies upon certain decisions of the Court of Customs and Patent Appeals which have no possible bearing upon the question here presented.

United States v. *Louis Wolf & Co.*, T. D. 43719, 56 T. D. 605 (U. S. Ct. Cust. Appls. 1929).

John Wanamaker v. *United States*, T. D. 43674, 56 T. D. 468.

In the former case it was held that certain children's games and a simple childish puzzle "akin to" a simple jig saw puzzle were dutiable as toys and not as manufactures of paper. Unquestionably the Court made a proper choice of classification. It said (p. 610):

> "We do not mean to say that all games with which children play are toys, but in this decision we mean to hold that the simple toys under consideration here, although they involve the element of a game, are not such as should be denied toy classification."

In the latter case it was held that jig saw puzzles of about 250 pieces were not dutiable as toys but as manufactures of paper. Here the evidence established the fact that these puzzles were designed for adult use. While this took them out of the category of "toys", however, it did not put them into the category of games.

Neither of these cases is any authority to sustain the petitioner's contention that the articles in controversy were taxable as games under Section 609. They are utterly inapplicable to the facts in the case at bar, which clearly establish a definite line of demarcation between

games, toys and puzzles as separate and distinct categories of amusement devices (R. 15, 24).

It is apparently argued (Br., pp. 20, 21) that all games are classified as toys under the Tariff Act, if designed for children. This is not always the case, however, since it has not only been held that certain types of children's games are dutiable as toys, but that some games which are designed for children are not dutiable as toys:

> *United States* v. *Field,* T. D. 40738, 47 T. D. 292 (U. S. Ct. Cust. Appls., 1925).
>
> *United States* v. *Strauss,* T. D. 41025, 48 T. D. 29.

There is accordingly no authoritative basis for the petitioner's assertion (Br., pp. 20, 21) that "jig saw puzzles, *like other games* . . . are classified as toys if designed for children". (Italics ours.) Nor is there any justification for the statement (Br., p. 19, 20) that all toys could be included in the term "games". The word "toys" appearing in the exception clause in the statute was obviously inserted out of abundance of caution.

V. UNDER THE DOCTRINES EJUSDEM GENERIS AND NOSCITUR A SOCIIS THE JIG SAW PICTURE PUZZLES MANUFACTURED BY THE VIKING COMPANY WERE NOT SUBJECT TO TAX.

Section 609 imposes a tax upon "chess and checker boards and pieces, dice, games and parts of games". It is submitted that under the well established rule by which words of general meaning take their character from words of specific meaning which precede them, the games intended to be taxed by Congress were games similar to chess, checkers and dice, all of which involve

a contest between two or more persons or sides according to a set of rules and in which the result is always uncertain.

The doctrine *ejusdem generis* is that where special words are used which are followed by words of more general import, the general words are limited to things of the same kind.

United States v. *Nichols,* 186 U. S. 298, 300.

Under this doctrine and the closely related doctrine *noscitur a sociis,* by which the meaning of doubtful words is ascertained by reference to the meaning of associated words, the conclusion seems inescapable that Congress had in mind only such games as involved a contest between two or more persons according to a set of rules. This doctrine has been frequently applied in determining the intent of Congress.

United States v. *Baumgartner,* 259 Fed. 722.
Phez Co. v. *United States,* 25 F. (2d) 1011, (D. C., D. Ore. 1927), aff'd *United States* v. *Phez Co.,* 28 F. (2d) 106 (C. C. A. 9, 1928).

In the *Phez Co. case, supra,* the question was whether the product "Lo-ju" was taxable as a soft drink under Section 628 of the Revenue Act of 1918. The District Court said (p. 1012):

> "It seems to me, however, that, as indicated by the *Monroe Cider* and *Casey cases, supra,* soft drink as used by the statute is not to be given such a general and broad meaning, but is to be interpreted with reference to the class of products with which it is associated. *It follows in the statute words of particular and specific meaning, and should not be construed in the broader sense, but as*

applied to products of similar general class to those specifically mentioned. O'Neill v. *Odd Fellows,* 89 Or. 382, 174 P. 148; *Virginia* v. *Tenn.,* 148 U. S. 519, 13 S. Ct. 728, 37 L. Ed. 537 . . ." (Italics ours.)

So in the opinion of the Circuit Court of Appeals, Circuit Judge Gilbert said (p. 107):

"In brief, we think it is clear that Congress, in enacting the Revenue Law of 1918, did not intend to classify unfermented grape juice as a soft drink, and that in employing the words 'and other soft drinks' the intention was to include all other artificial manufactured drinks of the same general nature as the soft drinks which had just been enumerated . . ."

The construction contended for by the respondent, namely, that a game is a contest, in accordance with the fourth dictionary definition hereinbefore referred to, was followed by the Commissioner in Article 55 of Regulations 46, which reads as follows:

"ART. 55. GAMES.—Among the articles subject to tax as games are dice, chess and checker sets, pingpong sets, roulette wheels, backgammon sets, *etc.*"

The enumeration of the foregoing articles (which are all used in games of contest) as being taxable as games, is concrete evidence of the application of these doctrines by the Commissioner himself in defining the scope of the word "games". The abbreviation "etc." means, of course, "and others of the like kind" and is generally used when a number of members of a class have been specified, to indicate that more of the same sort might have been mentioned but for shortness are omitted.

Petitioner argues (Br., p. 18) that the doctrine *ejusdem generis* is inapplicable since the enumeration preceding the general phrase in the statute is "relatively slight". It should be observed that the specific enumeration of games of contest is by no means slight. The legislative history of the tax on games, moreover, shows that Congress itself was guided by this principle. The Report of the Senate Committee on Finance under the Revenue Act of 1917 states (*infra,* p. 44) that the tax applies to articles used in "certain amusement games, such as tennis rackets, . . . checker and chess boards, dice, etc. . . ." and to "certain like articles".

It is therefore submitted that Section 609, as tested by these rules of statutory construction, has no application to jig saw picture puzzles, which have no similarity either to "games" as a general class or to the particular games enumerated by Congress in that section, and that the decision and ruling of the Circuit Court of Appeals in the instant case, which was based in part upon the application of these well known doctrines *ejusdem generis* and *noscitur a sociis,* is correct.

VI. THE LEGISLATIVE HISTORY OF THE TAX ON "GAMES", AS CONTAINED IN THE REVENUE ACT OF 1932 AND PRIOR REVENUE ACTS, DOES NOT DISCLOSE AN INTENT TO TAX "PUZZLES".

The construction of Section 609 which was adopted by the Circuit Court of Appeals finds ample support in the legislative history of the Revenue Acts which imposed a tax on games. The trial court said, in the course of its opinion (R. 12):

> "There is nowhere shown in the enactment an *intent to except* a game or puzzle such as is here involved . . ." (Italics ours.)

The usual judicial approach, however, is an endeavor to ascertain not whether an intention to exempt jig saw picture puzzles from taxation appears, but whether an intention to include them as subjects of taxation is disclosed from the language of the statute. In this connection the Congressional Committee Reports clearly reveal the affirmative presence of an intention on the part of Congress not to include picture puzzles within the scope of Section 609.

1. The tax on games first appeared in our revenue laws in section 600 of the Revenue Act of 1917, which was entitled: "An Act to provide revenue to defray war expenses, and for other purposes." Mr. Kitchin, of the House Committee on Ways and Means, in the report accompanying H. R. 4280 (Revenue Act of 1917), stated, with reference to the war excise taxes proposed under Title VI of that Act (Report of Committee on Ways and Means, No. 45, 65th Congress, 1st Session, 1917, Vol. I, Miscellaneous, No. 7252, p. 7):

> "This title proposes the levy of a tax equivalent to 5 per cent of the price for which sold by the manufacturer, producer, or importer of . . . athletic and sporting goods, including games . . .
>
> "It is estimated that the taxes levied in this title will yield during a 12-month period $118,750,000, distributed as follows: . . . Athletic goods, etc., $2,000,000 . . ."

It should be observed that the tax was referred to as a tax on "Athletic and sporting goods' including games" and that in estimating the yield, the subject matter of the tax was referred to as "athletic goods". This discloses an intention to tax articles involving the element of contest rather than every instrumentality

and device which furnishes recreation, amusement or diversion.

The Report of the Senate Committee on Finance to accompany H. R. 4280 (Report No. 103, 65th Congress, 1st Session, Vol 1, Miscellaneous, No. 7249) states, at page 1:

> "Your committee devoted more than 10 weeks to earnest and painstaking consideration of the bill. They spent nearly a week giving hearings. *These hearings were attended by representatives of nearly every interest affected* by any of the provisions of the bill. The printed hearings cover over 650 printed pages." (Italics ours.)

And at page 11:

> "TITLE VI. WAR EXCISE TAXES.
>
> "Your committee felt certain that articles used in *certain amusement games,* such as tennis rackets, billiard and pool balls, billiard and pool tables, checker and chess boards, dice, etc., should bear a moderate tax of this character, and acting upon this principle has retained the gross-sales tax imposed by the House bill *upon these and certain like articles,* but has reduced the rate of 5 percent of the House bill to 2 percent." (Italics ours.)

Is it not clear from this Report of the Senate Committee that the tax was limited to the specific articles enumerated? In view of the obvious need for revenue, it is difficult to understand why puzzles generally or jig saw picture puzzles in particular were not included, if it were at that time the intention of Congress to tax them, especially when it appears that jig saw picture puzzles have been a well known article of commerce for a period long prior to the Revenue Act of 1917.

2. It was not until the Revenue Act of 1918 that the catch-all phrase "and all similar articles commonly or commercially known as sporting goods" was added to cover articles similar to those particularized. The specific enumeration was more detailed than in Section 600 of the 1917 Act. In addition to the items there mentioned, the following articles were enumerated: Nets, racket covers and presses, skates, snow shoes, skis, toboggans, canoe paddles and cushions, polo mallets (baseball), gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basketball goals and uniforms.

Article 18 of Regulations 47, relating to excise taxes on sales by the manufacturer under Section 900 of the Revenue Act of 1918, contained a detailed illustrative description of articles not specifically mentioned which were taxable under the general phrase "and all similar articles commonly or commercially known as sporting goods". No mention was made of jig saw picture puzzles at *that* time although they were well known and in common use, nor was any attempt made in the Regulations to ascribe to the phrase "games and parts of games" the broad signification which was adopted by the Commissioner in his Regulations under the Revenue Act of 1932 and in the ruling S. T. 567, published more than five months after its passage.

3. In connection with H. R. 10236, which became the Revenue Act of 1932, it is interesting to note that the report of the House Committee (House Report No. 708, 72d Congress, 1st Session, No. 9492) recommended a general manufacturers' excise tax as a temporary measure, and in that connection stressed the importance of certainty as to tax liability. The Report states (p. 32):

> *"It is essential that the persons who will be called upon to make returns and pay the tax to the government must know, in advance of the sale, whether the sale is taxable* and the amount of the tax liability. Having ascertained the taxability of the sale and the basis upon which the amount of tax is to be computed, they must be able to rely upon the determination. Retroactive imposition of the tax, or change in the method by which the tax is computed, necessarily results in hardship and dissatisfaction, which in turn will bring about the breakdown of the tax." (Italics ours.)

The Senate Committee on Finance, in its Report accompanying H. R. 10236 (Report No. 665, 72d Congress, 1st Session, No. 9488) recommended elimination of some of the excise taxes contained in the House bill, including the tax on sporting goods (pp. 3, 11, 44). This provision, however, was retained, but by amendments No. 159, 160 and 161 in the Senate, to which the House at first objected and subsequently receded, the list of taxable articles was expanded to *include* tennis racket frames and strings and football uniforms, and to *exclude* canoe cushions and football goals. (See Conference Report to accompany H. R. 10236, Report No. 1492, 72d Congress, 1st Session, No. 9493.)

The specific exclusion of football goals from Section 609 of the Revenue Act of 1932 after their inclusion under Section 900 of the Revenue Act of 1918 would seem quite clearly to indicate an intention not to tax football goals, although they would be included under the catch-all phrase "and all similar articles commonly or commercially known as sporting goods". The respondent submits that this conference committee

report clearly shows that Congress intended to tax only such articles as were mentioned and that such articles as were eliminated were not intended to be taxed. Consistent with this view is the ruling of the Commissioner in S. T. 461 (XI-2 Cumulative Bulletin 479) in which he held that fishing tackle, such as nets, lines, hooks, baits, flies, etc. are not taxable under Section 609 because not mentioned, notwithstanding the fact that the statute applies to "fishing rods and reels . . . and all similar articles commonly or commercially known as sporting goods".

There is no warrant, therefore, in the legislative history of the tax on "games" for attributing to Congress an intent to embrace within the scope of Section 609 every article which might conceivably be known as "sporting goods" or "games", or every contrivance designed to furnish sport, recreation or amusement.

VII. IN THE LIGHT OF THE ADMINISTRATIVE PRACTICE AND INTERPRETATION UNDER PRIOR REVENUE LAWS, PICTURE PUZZLES OF THE JIG SAW TYPE ARE NOT TAXABLE AS "GAMES AND PARTS OF GAMES" UNDER SECTION 609 OF THE REVENUE ACT OF 1932.

The Revenue Acts of 1917 and 1918,[4] which were in effect for a period of more than four years, from Octo-

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[4] The provisions in those laws with respect to the tax on games are hereinafter set forth for comparison with Section 609 of the Revenue Act of 1932:

"REVENUE ACT OF 1917.

"SEC. 600 (f) Upon all tennis rackets, golf clubs, baseball bats, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, *chess and checker boards and pieces, dice, games and parts of games,* except playing cards and children's toys and games, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold." (Italics ours.)

ber 4, 1917 to December 31, 1921, contained the same provision taxing "chess and checker boards and pieces, dice, games and parts of games" which appears in Section 609 of the 1932 Act. During this entire period jig saw picture puzzles, although they were a well known article of commerce, were not taxed as "games". Nor were they subjected to any tax under Section 609 of the 1932 Act, during the first five months of its operation. It was not until the ruling in S. T. 567, which was made on November 14, 1932, that the Commissioner of Internal Revenue adopted a construction of Section 609 under which jig saw picture puzzles were held by him to be taxable as "games".

It is also significant that, although there must be thousands of puzzles, there has never been a published ruling or regulation taxing any puzzle as a "game" other than the one here in controversy. And, as has already been pointed out, cross word puzzles were expressly ruled to be non-taxable as games.

Under these circumstances the respondent submits that the long-established administrative practice under these revenue laws is very persuasive to show that the phrase "games and parts of games" does not include jig saw picture puzzles, that being for a long time the construction or interpretation adopted by the executive

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"REVENUE ACT OF 1918.

"SEC. 900 (5) Tennis rackets, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, *chess and checker boards and pieces, dice, games and parts of games* (except playing cards and children's toys and games), and all similar articles commonly or commercially known as sporting goods, 10 per centum." (Italics ours.)

department charged with the enforcement of the statute.

The law is well settled that when the meaning of a statute is doubtful, great weight will be given to the construction placed upon it by the department which is charged with its execution.

Robertson v. Downing, 127 U. S. 607.
United States v. *Hermanos,* 209 U. S. 337.
Komada & Co. v. *United States,* 215 U. S. 392.

It is likewise well settled that the re-enactment by Congress without change of a statute which has previously received a long-continued executive construction is an adoption by Congress of such construction.

United States v. *Falk,* 204 U. S. 143, 152.
Brewster v. *Gage,* 280 U. S. 327, 337, 50 S. Ct. 115, 74 L. Ed. 457.
National Lead Co. v. *United States,* 252 U. S. 140.
Edwards v. *Wabash Ry. Co.,* 264 Fed. 610.
Poe v. *Seaborn,* 282 U. S. 101, 106.
McCaughn v. *Hershey Chocolate Co.,* 283 U. S. 488, 492.
McFeely v. *Commissioner,* 296 U. S. 102, 108.

See also

Old Colony R. Co. v. *Commissioner,* 284 U. S. 552, 52 S. Ct. 211, 76 L. Ed. 484.
Minnesota Tea Co. v. *Commissioner,* 76 F. (2d) 797.
United States v. *Field,* 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617.
Smietanka v. *First Trust & Savings Bank,* 257 U. S. 602, 42 S. Ct. 223, 66 L. Ed. 391.

Schwab v. *Doyle,* 258 U.S. 529, 42 S. Ct. 391, 66 L. Ed. 747.

Douglas v. *Edwards,* 298 Fed. 229, 238 (C. C. A. 2, 1924).

In the instant case the provisions of the Revenue Acts of 1917 and 1918 imposing a tax on "games" were re-enacted without change and the administrative interpretation under which jig saw picture puzzles were not included within their application was of long duration. It is accordingly submitted that under this rule of statutory construction it was not the intention of Congress to subject picture puzzles of the jig saw type to taxation as "games".

The petitioner contends that the principle of prior administrative construction has no application to this case. It is said (Br., p. 9, Note 1) that the statement that "under the earlier Acts jig saw puzzles were manufactured and sold without being subject to the tax is founded solely upon an assertion of taxpayer's counsel in the course of a colloquy at the trial". No assertion is or can be made by the petitioner, however, that they were taxed under the prior Acts. Nor can it be argued that the absence of any ruling on the taxability of jig saw puzzles is of no consequence. The failure of the Commissioner to construe the prior Acts as being applicable to jig saw picture puzzles is the adoption by him of an administrative construction which is entitled to weight in determining the meaning of the identical phrase in the 1932 Act. There is no question on the record that such puzzles have been well known commercial articles almost since time immemorial.

VIII. IF THERE IS ANY DOUBT THAT THE PHRASE "GAMES AND PARTS OF GAMES" INCLUDES JIG SAW PICTURE PUZZLES, THIS DOUBT SHOULD BE RESOLVED AGAINST THE TAXING POWER AND IN FAVOR OF THE TAXPAYER.

The Circuit Court of Appeals said in its opinion (R. 62):

> "If there is a reasonable doubt as to the meaning of the Act, it should be construed most favorably to the taxpayer. *Gould* v. *Gould,* 245 U. S. 151. But we see no reason for resorting to that expedient here."

While there can be no doubt on this record, and under the applicable authorities, that Congress did not intend to tax jig saw picture puzzles as games, if any vestige of doubt remains to be dispelled the case would call for the application of the well known rule of doubt.

The fact alone that the word "game" has seventeen dictionary definitions is sufficient to raise the question whether the word is not too vague, equivocal, indefinite and ambiguous to be made the basis for imposing a tax on jig saw picture puzzles. The only basis upon which the tax in controversy could be justified is by attributing to Congress an intent to tax as games every contrivance or device designed to furnish "sport, recreation or amusement". This construction, however, as has been shown above, would lead to absurd consequences. It would override and ignore the distinction between a game and a puzzle which persists in common usage and in the terminology of the trade. It would disregard the legislative history of the tax on games which indicates that the intention was to tax as "games" and "sporting goods" only those articles specifically men-

tioned and all similar articles under the doctrines *ejusdem generis* and *noscitur a sociis*. All these considerations, even assuming that they do not establish the unmistakable intention of Congress, are more than sufficient to require the resolution of any doubts which they may create in favor of the respondent.

Particularly is this true in view of the doubts which existed in the mind of the Commissioner himself. During the period of more than four years in which the Revenue Acts of 1917 and 1918 were effective, he did not consider jig saw picture puzzles to be taxable as "games". Nor did the trade generally know of the imposition of such a tax until the ruling in S. T. 567 in November of 1932. On August 26, 1932 the Commissioner expressly ruled that jig saw puzzles were not taxable as "games" under Section 609 (Plff's Ex. 1, R. 20). On November 14, 1932, in S. T. 567, he ruled that jig saw puzzles containing more than 50 pieces were taxable. On February 7, 1933 he ruled that they were taxable from that date (Deft's Ex. A, R. 39), although, if they were taxable under Section 609 they would have been taxable from the effective date of the Act, which was June 21, 1932. It must have been the realization of this inconsistency which led the Commissioner to rule on April 20, 1933 (Deft's Ex. B, R. 40) that the tax on jig saw or picture puzzles was effective not from February 7, 1933 or November of 1932 but from the effective date of the Revenue Act of 1932.

In view of this confusion and vacillation on the part of the Commissioner; in view of the legislative history of the tax on games; in view of the prior administrative construction of language identical with that used in Section 609; in view of the overwhelming evidence in

the record that "games" do not include "puzzles" in the terminology of the trade; in view of the fact that there are three separate and distinct types or categories of amusement devices, namely, games, puzzles and toys; in view of the fact that cross word puzzles were ruled to be non-taxable as games; in view of the fact that under the definition of game adopted by the Commissioner in Article 53 of Regulations 46 all of the articles enumerated in Article 56 of said Regulations, namely, gymnasium equipment, rowing machines, punching bags, dumb-bells, parallel bars, etc. would be just as much subject to tax as articles "designed to furnish sport, recreation or amusement" as would jig saw picture puzzles; in view of the fact that no other form or type of puzzle has been held to be taxable as games by any published regulation or ruling; and in view of the fact that the definition for which the petitioner contends would lead to absurd results in that it would render taxable not only the many articles which the Commissioner himself has ruled to be non-taxable but innumerable articles which by no stretch of the imagination could be considered games; it is respectfully submitted that, if resort must be had to the rule of doubt, that construction should be adopted which is most strongly against the government and in favor of the citizen.

Gould v. *Gould,* 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211.

Eidman v. *Martinez,* 184 U. S. 578, 583, 22 S. Ct. 515, 46 L. Ed. 697.

United States v. *Merriam,* 263 U. S. 179, 44 S. Ct. 69, 68 L. Ed. 240.

United States v. *Field,* 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617.

Monroe Cider, Vinegar & Fruit Co. v. *Riordan,* 280 Fed. 624.

Smietanka v. *First Trust & Savings Bank, supra*

Crooks v. *Harrelson,* 282 U. S. 55.

Skinner v. *United States,* 8 F. Supp. 999 (D. C., S. D. Ohio, W. D. 1934).

Iselin v. *United States,* 270 U. S. 245.

In *Gould* v. *Gould, supra,* this Court held that alimony paid to a divorced wife under a decree of court was not taxable income under the income tax act of 1913. Mr. Justice McReynolds, who delivered the opinion of the Court, said (p. 153):

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. *United States* v. *Wigglesworth,* 2 Story, 369; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468, 474; *Benziger* v. *United States,* 192 U. S. 38, 55."

In the case of *Monroe Cider, Vinegar & Fruit Co.* v. *Riordan, supra,* it was said (p. 634):

> "We are fully satisfied that sweet cider is not subject to the tax, but, in any event, it is plain that in this instance Congress has not expressed its intention to tax sweet cider in that clear and unambiguous language which must be present before it should be held that a particular article of commerce

is subject to a tax statute *which does not name it specifically* and comprehends it only if a meaning be given to the term 'other soft drinks' which neither the history nor the structure of the statute justifies." (Italics ours.)

So in the case of *Crooks* v. *Harrelson, supra,* this Court said (p. 61):

"Finally, the fact must not be overlooked that we are here concerned with a taxing Act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In *United States* v. *Merriam,* 263 U. S. 179, 187–188, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used', we quoted with approval the words of Lord Cairns in *Partington* v. *Attorney-General,* L. R. 4, H. L., 100, 122, that 'if the Crown, seeking to recover the tax, can not bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' "

IX. THE COMMISSIONER'S RULING IN S. T. 567, SUBJECTING JIG SAW AND PICTURE PUZZLES OF MORE THAN 50 PIECES TO TAX AS "GAMES" UNDER SECTION 609 OF THE 1932 ACT, IS AN ARBITRARY, UNREASONABLE AND DISCRIMINATORY CLASSIFICATION IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The uncontradicted evidence in the record convincingly demonstrates how untenable is the position taken by the Commissioner in S. T. 567. This ruling is not founded in common sense. The difficulty of a jig saw puzzle does not depend upon the number of pieces it contains. This is only one of many factors to be taken into account. Other factors are the size of the pieces, the shape of the cuts, the type of coloring, and finally, the type of picture. There is abundant evidence in the record to this effect (R. 16, 32, 36). The record also discloses that in the opinion of the plaintiff's expert witnesses children are at least as adept as adults and sometimes rather smarter than their parents in solving jig saw puzzles, that children can solve puzzles in excess of 50 pieces and that even the 162-piece Viking puzzle was too easy for children (R. 16, 26, 27, 30, 36). The mere statement that under the Commissioner's ruling a simple picture puzzle containing 51 pieces would be taxable while a more difficult puzzle of 50 pieces or less would be exempt from taxation seems sufficient to demonstrate the arbitrary and unreasonable character of this ruling.

On this state of the evidence, it is submitted that there is no basis in reason for the arbitrary and discriminatory ruling made by the Commissioner and applied to this taxpayer in the classification of taxable and non-

taxable articles. Congress itself has been held to the rule of reason.

Nicol v. *Ames,* 173 U. S. 509.
Smyth v. *Ames,* 169 U. S. 466.
Quaker City Cab Co. v. *Pennsylvania,* 277 U. S. 389, 401.
Near v. *Minnesota,* 283 U. S. 697.
Brushaber v. *Union Pacific R. R.,* 240 U. S. 1, 24, 25
Stebbins v. *Riley,* 268 U. S. 137.
Diamond Shoe Co. v. *Commissioner,* 42 F. (2d) 144.
Frew v. *Bowers,* 12 F. (2d) 625, 630.

It is now well settled, since the decision in the *Brushaber case, supra,* that the due process clause of the Fifth Amendment is a limitation on the taxing power of Congress where "the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or what is equivalent thereto, was *so wanting in basis for classification* as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." (Italics ours.)

Were there not some such limitation upon the Federal taxing power it would result in a situation where, to use the language of Judge Learned Hand in the case of *Frew* v. *Bowers, supra,* (p. 630):

> "Taxpayers may be selected by lot and assessments may vary with the price of wheat."

In *Stebbins* v. *Riley, supra,* Mr. Justice Stone, speaking for this Court, enunciated the following rule of classification (p. 142):

> "The taxing statute may, therefore, make a classification for purposes of fixing the amount or incidence of the tax, provided only that all persons subjected to such legislation within the classification are treated with equality, *and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation.*" (Italics ours.)

In *Nicol* v. *Ames, supra,* this Court held that a Federal tax on sales at a Board of Trade or Exchange did not violate the uniformity requirement of the Constitution because the classification was reasonable. The Court, however, through Mr. Justice Peckham, laid down the following rule of classification (p. 521):

> ". . . the question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural."

The right of the Commissioner, as an administrative official, to construe a statute of Congress should be confined within its proper limits. No power rests in him to subject an article to taxation which can not be brought within the terms of the statute, reasonably construed. The rule of reason by which Congress itself is bound in the classification of taxable subjects is and should be even more stringent in its application to an administrative officer charged with the interpretation and enforcement of the will of Congress.

The respondent respectfully submits that the ruling in S. T. 567 has no foundation in reason, that it constitutes an unconstitutional discrimination against manu-

facturers of jig saw picture puzzles in excess of 50 pieces, and that the imposition of the tax in controversy on the basis of this ruling is without legislative sanction and a deprivation of property without due process of law.

X. THE OUIJA BOARD AND SLOT MACHINE CASES DISTINGUISHED.

Petitioner relies upon two cases, neither of which is authority for the contentions advanced by him in the case at bar.

> *Baltimore Talking Board Co. Inc.* v. *Miles,* 280 Fed. 658 (C. C. A. 4, 1922), cert. denied, 259 U. S. 587.
>
> *Mills Novelty Co.* v. *United States,* 50 F. (2d) 476 (Ct. Cl: 1931). cert. denied, 285 U. S. 547.

In the *Baltimore Talking Board Co. case, supra,* the Court held that a Ouija board was a game within the meaning of Section 900 of the Revenue Act of 1918. That decision, however, rests upon the fact that there was evidence that the plaintiff had obtained a patent which described the Ouija board as follows (p. 660):

> "The object of the invention is to produce *a game with which two or more persons can amuse themselves* by asking questions and having them answered by the device used and operated by the touch of the hand, so that the answers are designated by the letters of the alphabet." (Italics ours.)

The effect to be given to the specifications of a patent is likewise shown in the case of *Eaton* v. *American Chain Co.,* 63 F. (2d) 783 (C. C. A. 2, 1933) as to which the Court said in the case of *Routzahn* v. *Willard Storage Battery Co.,* 65 F. (2d) 89 (C. C. A. 6, 1933), at page 92:

"The articles on which alleged erroneous taxes were assessed in the latter case were 'Weed Chains'. There was no showing that the specific chains sold, and for which the tax was imposed, were designed and primarily adapted for any other specific use than that on automobiles. Moreover, the development of tire chains followed the development and general use of the automobile, and was in response to a need presented by it. Finally, 'Weed Chains' are articles covered by United States patent, and the patent clearly specifies them as primarily useful on automobiles to prevent skidding. *It may well have been thought that the description and specification of the patent, without more, are conclusive on the question of their primary adaptability.* See, also, *Philadelphia Storage Battery Co.* v. *Lederer* (D. C.) 21 F. (2d) 320; *General Lead Batteries Co.* v. *United States,* (Ct. Cl.) 60 F. (2d) 177." (Italics ours.)

Moreover the defendant in the Ouija board case introduced envelopes, boxes and boards with directions printed thereon setting out the well known method of operating the board. In the case at bar, however, the record discloses that there are no rules for the solution of a jig saw picture puzzle (R. 16, 26, 31).

Circuit Judge Woods, who delivered the opinion of the Court, said (pp. 661, 662):

"In view of the comprehensive scope of the Revenue Act, the common knowledge that the Ouija board is so generally used as a means of amusement, *the fact that the Patent Office issued a patent describing it as a game,* the presumption that the revenue officers correctly found *it was so used* after

investigation, *and the absence of any testimony to the contrary,* we think the finding of the District Judge had adequate support in the testimony and therefore cannot be reversed by this Court." (Italics ours.)

The statement of the Court that (p. 661):

"The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries; that is, articles not reasonably necessary to comfort according to the average standards of American life . . ."

had no specific reference to the phrase "games and parts of games" in Section 900 (5) of the 1918 Act but was directed to Section 900 in its entirety. This section, in addition to taxing games and sporting goods, imposed a tax upon a wide variety of articles named in its twenty-one subdivisions, including such articles as automobiles, automobile parts and accessories, musical instruments, chewing gum, candy, films, firearms, hunting knives and guns, electric fans, thermos bottles, smokers' articles, slot machines, liveries, fur goods, pleasure boats and toilet soaps. The Court could not have meant that all luxuries were taxable under this statute since it expressly said that the intention was disclosed to tax the sale of "all articles which were thought of and named".[5]

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[5] There is indeed a question whether the excise taxes imposed under Title IV of the Revenue Act of 1932 are taxes on luxuries. Most of the articles have come to be considered necessaries under present standards of life. In the minority report of the House Committee on Ways and Means on House Joint Resolution 375 extending these excise taxes from June 30,

It is respectfully submitted that, if the Ouija board case holds that any article or instrumentality "not reasonably necessary to comfort according to the average standards of American life" is taxable as a game, if used for "amusement and diversion", such a construction is too broad and that the refusal of the Circuit Court of Appeals to adopt such a construction was entirely correct. *Illfelder* v. *United States,* T. D. 31115, 19 T. D. 59.

In the course of his dissenting opinion in the Ouija board case, Circuit Judge Knapp said (p. 662):

> "I am not convinced that the Ouija board is a game, within the meaning of the Revenue Act or otherwise. The standard definition of the term, which reflects its common acceptation, namely, 'A contest for success or superiority in a trial of chance, skill or endurance, or any two or all three of these combined', clearly does not include the device in question, since it has no relation to a contest of any sort. And if we take the term in its broadest sense, 'A play, or sport for amusement', we still have always the element or idea of winning, of success or superiority, of accomplishing a definite and

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1937 to June 30, 1939 (Report No. 935, 75th Congress, 1st Session) it was said (p. 21):

> "The so-called 'nuisance taxes' are all consumption taxes, which fall most heavily on the poor and those least able to pay. They are also discriminatory, in that they apply only to certain selected items."

In the debate on this resolution on June 24, 1937 on the floor of the Senate Mr. Vandenberg said (Congressional Record, 75th Congress, 1st Session, Vol. 81, p. 8167):

> "I doubt if any tax bill that comes before the Senate reaches a larger number of American people than does this one, because it puts what is nothing more nor less than a sales tax upon numerous commodities which enter into the daily life of every man, woman and child in the land."

desired result. In no substantial respect does the Ouija board answer this description. In short, it lacks the essential and ever-present characteristic of a game, under any accepted definition of the term.

"The general clause of the section, 'games and parts of games', must be construed, under the familiar doctrine of *ejusdem generis,* as embracing only articles of some similarity to those specifically mentioned. But the Ouija board has no real likeness in construction or use to any of the specified articles."

Aside from the well-reasoned dissenting opinion of Judge Knapp, the cogency of whose view is urged upon this Court, the facts in the Ouija board case are so different from those established on this record that the decision in that case can be of no force as a controlling precedent in the case at bar. There is a complete absence of similarity between the Ouija board and the jig saw picture puzzles here in controversy. In that case the taxpayer had obtained a patent which described the article as a game. The jig saw picture puzzles here in controversy, however, were not patented. In that case the article was accompanied with printed directions for its operation. In the case at bar the uncontradicted testimony discloses that there are no rules for the solution of a jig saw picture puzzle (R. 16, 26, 31). In that case there was no testimony that the article was not a game. In the case at bar the overwhelming and undisputed testimony established the fact that a jig saw picture puzzle is not a game, either in the terminology of the trade or in common parlance. As the Circuit Court of Appeals pointed out in its opinion (R. 61), the par-

ticular article here sought to be taxed is a *puzzle,* which is defined as "a contrivance designed for testing ingenuity". Obviously the Ouija board is not such a contrivance and therefore has no similarity to the article in controversy.

Moreover, there was no evidence in that case, as abundantly appears on this record, of a long-established executive practice or construction under which the tax on "games" was not held to be applicable to jig saw picture puzzles; nor was there any evidence in that case of vacillation and uncertainty on the part of the Commissioner as is disclosed by the contradictory rulings which are in evidence in the case at bar.

With respect to the *Mills Novelty Co. case, supra,* the respondent contends that this decision, as the Circuit Court of Appeals held (R. 62), supports his position rather than that of the petitioner. The majority opinion clearly points out that the slot machines in question were games of chance between the owner of the machine and the operator, in other words, a game of contest in which at least two persons engaged. The Court said, in the course of its opinion (pp. 477, 478):

> "The machines involved in the case were operated by placing a coin in a slot, and were so designed that the operators thereby obtained a chance as against the owner of the machine of winning or losing through the operation."
>
> . . . . . .
>
> ". . . It is obvious that the results are the same as they would be if the owner set in motion the machine upon receiving the coin. If, instead of this automatic machine, the owner had had one of those gambling devices in which a wheel is used which

revolves when set in motion by the owner, and by chance stops at a certain point, we think no one would contend that a game was not being played. We do not think it makes any difference under the law whether the one that takes the other side of the wager constructs a machine that will operate in his absence or operates it personally. Clearly the effect is the same."

. . . . . .

". . . In the instant case the operator staked money on the result of the operation of the machine. The machine was supplied with money by the owner, and, if the operator was fortunate enough to have its revolutions result in his favor, money of the owner was released and dropped into a receptacle where the party playing the machine could take it; otherwise the operator lost the coin which he had put in the machine. In operating the machine the user simply put up his money at long odds against the money of the owner of the machine."

. . . . . .

"In our opinion, *the gambling machines involved in the case were articles or apparatus used in playing a game as the word is used in the statute,* and, if we are correct in this, it follows that the plaintiff was subject to the tax in controversy . . ." (Italics ours.)

Petitioner argues (Br., p. 13) that, just as in the case of the slot machine there is competition against the absent owner, so in the case of the jig saw puzzle there is competition against the absent manufacturer. This argument is no less fanciful than the argument that

there is competition against time. So far as the slot machine is concerned there is clearly competition, since the absent owner has deposited his own money in the machine which he is gambling against that of the operator. This element is completely absent in the case of jig saw picture puzzles.

In view of all these considerations, it is respectfully urged that the Circuit Court of Appeals properly held that jig saw picture puzzles are not taxable as "games" under Section 609 of the Revenue Act of 1932.

CONCLUSION.

For all of the foregoing reasons it is respectfully submitted that the decision of the Circuit Court of Appeals is correct and should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1937.

Thomas W. White, Individually and as Former Collector of Internal Revenue, Petitioner,
vs.
Philip J. Aronson, Trustee.

Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 8, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

Respondent, Aronson, trustee in bankruptcy of The Viking Manufacturing Company, Inc., brought suit in the United States District Court for Massachusetts to recover $37,021.63 exacted of the bankrupt by the Collector, under color of Sec. 609 Revenue Act 1932,[1] (c. 209, 47 Stat. 264), on account of jig saw picture puzzles manufactured and sold from June 21, 1932, to May 1, 1933.

The puzzles were made by cutting selected pictures backed up by rigid cardboard into from 162 to 500 separate pieces. These were sold to those who found diversion or amusement in putting them together so as to reproduce the original picture.

Obviously the word "games" in the statute was intended to designate instrumentalities used in playing them.

The Collector maintained that the effort properly to arrange the pieces was for amusement or diversion and amounted to a game,

[1] Revenue Act 1932. Sec. 609. Tax on Sporting Goods.
There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Tennis rackets, tennis racket frames and strings, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and uniforms, basket ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games); and all similar articles commonly or commercially known as sporting goods.

within the appropriate definition of the word.[2] Accordingly, he said, these instrumentalities were taxable.

On the other hand, respondent insisted that the word "games" refers to contests, physical or mental, conducted according to set rules, undertaken for amusement or recreation or for winning a stake, requiring the participation of two or more persons;[2] also that the sundry pieces were parts of a puzzle, a contrivance designed for testing ingenuity—something not within the scope of the statute.[3]

The trial judge, having heard the cause upon pleadings and evidence without a jury, sustained the Collector's defense. The Circuit Court of Appeals concluded otherwise and directed judgment for the trustee. It said—

"The section [609] is headed 'Tax on Sporting Goods.' The articles or instrumentalities there specifically named are sporting goods whether they are used in connection with games or in some recreation or diversion other than a game. But the larger portion of the articles specifically named are all used in games of contest between two or more persons, and the question of construction is whether the articles or instrumentalities intended to be covered by the phrase 'games and parts of games' means articles or instrumentalities used in games of contest like the specific articles previously named in the section, which are used in games of tennis, polo, baseball, etc., all of which involve a contest. . . .

"Furthermore the particular article here sought to be taxed is a puzzle. A puzzle is defined as 'something which perplexes or embarrasses; a difficult problem or question; hence a toy, contrivance, question or problem designed for testing ingenuity; as a cross word puzzle.' Webster's New International Dictionary. A jig saw picture puzzle comes squarely within this definition—'a contrivance . . . designed for testing ingenuity.' None of the articles specifically named in the statute and used in games is a contrivance designed for testing ingenuity. They are designed for use in games of contest, while a jig saw puzzle is not."

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[2] Webster's New International Dictionary 2d Ed., gives the word game 17 definitions. "2 a An amusement or diversion; as, make-believe is a children's game; formerly, specif., amorous play, 'Daughters of the game.' Shak." "4. A contest, physical or mental, conducted according to set rules, and undertaken for amusement or recreation, or for winning a stake * * *."

[3] "Puzzle. 2. Something which perplexes or embarrasses; a difficult problem or question; an enigma; hence, a toy, contrivance, question, or problem designed for testing ingenuity; as, a crossword puzzle." Webster's New International Dictionary 2d Ed.

Section 600 (f), (c. 63, 40 Stat. 316) Revenue Act 1917, and Sec. 900 (5), (c. 18, 40 Stat. 1122) Revenue Act 1918, (repealed in 1921) laid a tax upon tennis rackets, golf clubs, baseball bats, etc., . . . "chess and checker boards and pieces, dice, games and parts of games". Jig saw picture puzzles were then well known articles of commerce. They go back at least to the first part of the last century—perhaps much farther. The same words "games or parts of games" appear again in the like section—609—Revenue Act 1932.

The court below pointed out that—

"A jig saw puzzle was never taxed under Section 900 (5) of the Act of 1918. It was not taxed until after the passage of Section 609 of the Revenue Act of 1932, when the government attempted to tax it as a game. The Act of 1932 became effective June 6, 1932. On August 26, 1932, the Commissioner issued a ruling stating that jig saw or die cut picture puzzles were not taxable. On November 14, 1932, he issued a ruling that they were taxable. On February 7, 1933, he ruled that after February 7, 1933, they were taxable if they contained more than fifty pieces. And on April 20, 1933, he ruled that they were taxable after June 21, 1932, if they contained more than fifty pieces."

Ample evidence disclosed that in commercial usage jig saw picture puzzles were never regarded as games; also that the trade recognized a definite distinction between puzzles and games. We must assume that Congress had knowledge of these things; also knew that jig saw picture puzzles were not assessed for taxes under the acts of 1917 and 1918; and, further, was not unmindful of the uncertainties concerning the meaning of "game" disclosed by *Baltimore Talking Board Co.* v. *Miles,* 280 Fed. 658, and *Mills Novelty Co.* v. *United States,* 50 F. (2d) 476.

The claim for the taxpayer here does not rest upon an exception to a general rule but upon construction of general language found in the act.

The Circuit Court of Appeals rightly concluded that—"The words 'games and parts of games' bring into the list of taxables only such other articles as are used in games of contest, the same as those particularly named are, and with which they are closely associated."

Certainly we cannot say that this construction was clearly erroneous. Other judges had accepted it. Nor can we affirm that the

statute as framed gave adequate notice to the bankrupt that its puzzles were to be taxed.

Where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. *Gould v. Gould,* 245 U. S. 151. "Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them." *Philadelphia Storage Battery Co.* v. *Lederer,* 21 F. (2d) 320, 321, 322.

Counsel for the Collector maintain that *Baltimore Talking Board Co.* v. *Miles,* (1922), *supra,* the *"Ouija Board"* case, and *Mills Novelty Co.* v. *United States,* (1931), *supra, "Coin Operated Gambling Machine"* case, are in conflict with the ruling under review.

These causes involved the act of 1918 and in both the judges expressed sharply opposing views. Of course, the general language of the opinions must be read in connection with the facts.

The ouija board is wholly different from the puzzle here under consideration; nothing indicates that it was commonly regarded by the trade as a puzzle; and in an application for a patent it had once been described as a game. If the opinion construes the statute as embracing all instrumentalities, not necessary for comfort, whose chief use is to afford amusement and diversion, it is obviously too broad. Knitting for diversion is not a "game"; nor is horseback riding.

The coin operated gambling machine has no resemblance to a jig saw picture puzzle and what was said concerning it is not helpful in the problem now before us.

Both of these causes were decided prior to the act of 1932 in which the words of the 1918 act were repeated notwithstanding the disclosed uncertainties concerning their meaning and with knowledge of the fact that theretofore puzzles had not been assessed for taxation under them.

The challenged judgment must be

Affirmed.

Mr. Justice STONE and Mr. Justice CARDOZO concur in the result.